No. 803

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IN THE

Supreme Court of the State of Ohio

No. 29306

THE SCOTT REALTY COMPANY,
Plaintiff-Appellant,

vs.

THE LASALLE & KOCH COMPANY,
Defendant-Appellee.

Appeal from the Decision of the Court of Appeals of the Sixth Judicial District of Ohio, Lucas County

PROCEEDINGS IN THE SUPREME COURT OF THE STATE OF OHIO

Vol. III—Pages 928 to 938

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IN THE

Supreme Court of the State of Ohio

No. 29306
C. A. No. 3865
C. P. No. 155490

The Scott Realty Company,

Plaintiff-Appellant,

vs.

The Lasalle & Koch Company,

Defendant-Appellee.

NOTICE OF APPEAL

(Filed July 22, 1942)

Now comes The Scott Realty Company, plaintiff-appellant herein, being plaintiff-appellee in the Court of Appeals of Lucas County, Ohio, and hereby gives written notice that it appeals on questions of law to the Supreme Court of Ohio from the orders, judgment and decree of said Court of Appeals of Lucas County, Ohio, entered in this cause on the 3rd day of July, 1942, by which said Court of Appeals ruled adversely to said plaintiff-appellant.

Said appeal is on questions of law and is taken to the Supreme Court (a) in a case involving a debatable consti-

tutional question, and (b) on condition that a motion to certify be allowed by the Supreme Court.

Similar notice of appeal is being filed in the Court of Appeals of Lucas County, Ohio, on the 22nd day of July, 1942.

The Scott Realty Company,
By Effler & Eastman and
Fraser, Effler, Shumaker & Winn,
Its Attorneys.

MOTION TO CERTIFY THE RECORD

(Filed July 31, 1942)

Now comes The Scott Realty Company, the undersigned plaintiff-appellant herein, and represents to the court that at the May, 1942, term of the Court of Appeals of Lucas County, Ohio, namely, on the 3rd day of July, 1942, in an action pending in said court (numbered 3865 on the docket of said court), wherein the undersigned plaintiff-appellant was plaintiff-appellee, and defendant-appellee, The Lasalle & Koch Company, was defendant-appellant, said court rendered a judgment in favor of the defendant-appellee, The Lasalle & Koch Company, and against the undersigned plaintiff-appellant.

This appellant further represents and shows to the court that it has heretofore filed notice of appeal in the Court of Appeals, and a similar notice in this court as required by law, and further, that said case is one of public

and great general interest, and that prejudicial error has been committed in the proceeding had in the Court of Appeals, and, by reason thereof, this Honorable Court has jurisdiction to, and ought to, review said judgment.

Wherefore, appellant makes application for an order directing said Court of Appeals to certify its record to the Supreme Court.

The Scott Realty Company,
By Effler & Eastman, and
Fraser, Effler, Shumaker & Winn,
Its Attorneys.

(H. W. Fraser)

ASSIGNMENT OF ERRORS

(Filed August 6, 1942)

The Scott Realty Company, appellant, for its assignment of errors herein says that the judgment entered by the Court of Appeals in the above entitled cause on July 3, 1942, is erroneous and against the just rights of the appellant in each of the following respects:

(1) The Court of Appeals erred in finding and adjudging in favor of appellee and against appellant;
(2) The Court of Appeals erred in failing and refusing to make findings or conclusions of fact, as requested in writing by appellant;
(3) The Court of Appeals erred in refusing to answer the interrogatories submitted in writing by appellant;
(4) The judgment of the Court of Appeals is contrary to law;

(5) The findings, orders, judgment and decree of the Court of Appeals are not sustained by any evidence;

(6) The findings, orders, judgment and decree of the Court of Appeals are not sustained by sufficient evidence;

(7) The Court of Appeals erred in finding that said arbitration, valuation or appraisal, and the return made thereon, were valid and binding and should be sustained;

(8) The Court of Appeals erred in failing to consider the second cause of action of the second amended petition and the evidence as to the fair market value of said real estate;

(9) The findings, orders, judgment and decree of the Court of Appeals, in sustaining said award, violate appellant's right to due process of law under Article I of Section 16 of the Ohio Bill of Rights and under Section 1 of the Fourteenth Amendment to the Constitution of the United States in that:

(a) Appellant was denied a hearing before said arbitrators;

(b) The errors of the Court of Appeals are so gross and obvious as to amount to arbitrary and capricious exercise of power.

As a result of the errors aforesaid, the findings, orders, judgment and decree of said Court of Appeals deprived this plaintiff and appellant of substantial justice in this cause and of its constitutional rights aforesaid; and, by reason thereof, the plaintiff and appellant is entitled to have said findings, orders, judgment and decree vacated and a final judgment entered in said cause in its favor, and

to be restored to all things lost by reason of said erroneous findings, orders, judgment and decree.

The Scott Realty Company,
By Effler & Eastman,
9th Floor, Home Bank Bldg.,
Toledo, Ohio,
and
Fraser, Effler, Shumaker & Winn,
7th Floor, Home Bank Bldg.,
Toledo, Ohio,
Attorneys for Plaintiff and Appellant.

The defendant and appellee acknowledges service of copy of the foregoing assignment of errors in the Supreme Court of Ohio this 5th day of August, 1942.

The Lasalle & Koch Company,
By Marshall, Melhorn, Wall & Bloch,
1434 Nicholas Bldg., Toledo, Ohio,
Brown & Sanger,
1007-16 Nicholas Bldg., Toledo, Ohio,
J. I. O'Connor,
810 Edison Bldg., Toledo, Ohio,
Attorneys for Defendant and Appellee.

MOTION TO DISMISS APPEAL AS OF RIGHT

(Filed August 22, 1942)

Now comes The Lasalle & Koch Company, appellee herein, and moves this court for an order dismissing the appeal as of right filed by the appellant, The Scott Realty Company, for the following reasons:

1. That no debatable constitutional question is involved in said cause.
2. That no question arising under the Constitution of the United States or the Constitution of the State of Ohio is involved in said cause.
3. That said alleged constitutional questions were not raised in either the Court of Common Pleas of Lucas County or the Court of Appeals of Lucas County, from whence this case is appealed, and that no application of said constitutions, or either of them, was asked for in said courts, said appellant, The Scott Realty Company, having first complained of having been deprived of its property without due process of law in the assignment of errors filed in this court.

J. I. O'Connor,
Brown & Sanger,
Marshall, Melhorn, Wall & Bloch,
Attorneys for The Lasalle & Koch Company, Appellee.

IN THE SUPREME COURT OF OHIO

January Term, 1942

DOCKET ENTRIES

Appeal from the Court of Appeals of Lucas County

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS OF LUCAS COUNTY TO CERTIFY ITS RECORD

MEMORANDA OF PLEADINGS, &c, FILED, WRITS ISSUED, &c.

July 22, 1942. Notice of appeal filed 7/31/42. Proof of service filed.

July 31, 1942. Motion for an order to certify record and proof of service filed.

Aug. 6, 1942. Assignments of error and proof of service filed.

Aug. 7, 1942. Application for an extension of time to file brief on motion filed.

Aug. 7, 1942. Entry extending time for filing appellant's brief to Aug. 15, 1942. Carl V. Weygandt, C. J. J. 36-691.

Aug. 15, 1942. Entry extending time for filing appellant's brief to Aug. 17, 1942. Edward C. Turner, J. J. 36-694.

Aug. 17, 1942. Appellant's printed brief and proof of service filed.

Aug. 18, 1942. Application to dispense with printing exhibits and proof of service filed.

Aug. 18, 1942. Entry dispensing with the printing of exhibits herein approved. Charles B. Zimmerman, J. J. 36-696.

Aug. 20, 1942. Application for leave to file papers and docket case on appeal as of right.

Aug. 20, 1942. Entry granting application for leave to docket case and file papers approved. Roy H. Williams, J. J. 36-697.

Aug. 20, 1942. Court of Appeals transcript, original papers and bill of exceptions (7 volumes) filed.

Aug. 20, 1942. Cause docketed on appeal as of right.

Aug. 20, 1942. Printed record filed (2 vol.).

Aug. 22, 1942. Motion by appellee to dismiss appeal as of right and proof of service filed.

Oct. 3, 1942. Printer's receipted bill filed.

Oct. 13, 1942. Appellee's printed brief (2 parts) and proof of service filed.

Nov. 19, 1942. Appellant's printed reply brief filed and proof of service filed.

Dec. 16, 1942. Motion for an order directing the Court of Appeals of Lucas County to certify its record overruled. J. 37-66.

Dec. 16, 1942. Motion by appellee to dismiss appeal as of right sustained. J. 37-66.

Dec. 16, 1942. Dismissed, no debatable constitutional question involved. J. 37-73.

Dec. 22, 1942. Notified application for rehearing to be filed.

Dec. 30, 1942. Application for rehearing filed.
Jan. 6, 1943. Rehearing denied. J. 37-91.
Jan. 6, 1943. Certified copy of entry sent clerk.
Jan. 6, 1943. Mandate issued.
Jan. 14, 1943. Original papers and B. E. sent to clerk.

JOURNAL ENTRIES

Friday, August 7, 1942. Upon application of appellant, and for good cause shown, it is ordered that the time for filing brief of appellant on motion to certify herein be, and the same hereby is, extended to August 15, 1942. J. 36-691.

Saturday, August 15, 1942. Upon application of appellant, and for good cause shown, it is ordered that the time for filing appellant's brief on motion herein be, and the same hereby is, extended to August 17, 1942. J. 36-694.

Tuesday, August 18, 1942. Upon application of The Scott Realty Company, plaintiff-appellant, and for good cause shown, it is ordered that the printing of the exhibits be dispensed with insofar as the printed record is concerned; and that reference shall be made to the original record on file with the clerk of this court in all matters concerning such exhibits. J. 36-696.

Thursday, August 20, 1942. This cause coming on to be heard on the application of the appellant herein for an order directing the clerk of the Supreme Court of Ohio to file out of rule transcript of docket and journal entries,

original papers, bill of exceptions and exhibits in the within cause and docket the same, the court, being fully advised in the premises, finds said application well taken and grants the same.

It is therefore ordered by this court that the clerk file said transcript of docket and journal entries, original papers, bill of exceptions and exhibits, and docket the within cause according to law. J. 36-697.

Wednesday, December 16, 1942. Motion for an order directing the Court of Appeals of Lucas County to certify its record.

It is ordered by the court that this motion be, and the same hereby is, overruled. J. 37-66.

Wednesday, December 16, 1942. Motion by appellee to dismiss appeal filed as of right.

It is ordered by the court that this motion be, and the same hereby is, sustained. J. 37-66.

Wednesday, December 16, 1942. Appeal from the Court of Appeals of Lucas County.

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Lucas County, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by the counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended, taxed at $.....

Ordered, that a special mandate be sent the Court of Appeals of Lucas County, to carry this judgment into execution. J. 37-73.

Wednesday, January 6, 1943. Upon consideration of the application for rehearing herein, it is ordered by the court that rehearing be, and the same hereby is, denied. J. 37-91.

CERTIFICATE

I, Seba H. Miller, clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing notice of appeal, motion to certify the record, assignment of errors and motion to dismiss appeal as of right are truly taken and correctly copied from the originals on file in this office; and that the foregoing transcript of the docket and journal entries of the Supreme Court of Ohio are truly taken and correctly copied from the records of said Supreme Court in said cause number 29306, to-wit: from the journals and minute book of said Supreme Court of Ohio.

In Witness Whereof, I have hereunto set my hand and affixed hereto the seal of the Supreme Court of Ohio, at Columbus, Ohio, this 5th day of February, A. D. 1943.

Seba H. Miller,

(Seal) Clerk of the Supreme Court of Ohio.

MAR 10 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 803

THE SCOTT REALTY COMPANY,

Petitioner.

vs.

THE LASALLE & KOCH COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

EFFLER & EASTMAN,
9th Floor, Home Bank Bldg.,
Toledo, Ohio,

FRASER, EFFLER, SHUMAKER & WINN,
7th Floor, Home Bank Bldg.,
Toledo, Ohio,

Attorneys for Petitioner.

Of Counsel:

HAROLD W. FRASER,
ERWIN R. EFFLER,
LEROY E. EASTMAN.

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Toledo, Ohio,

Attorneys for Petitioner.

Of Counsel:

HAROLD W. FRASER,
ERWIN R. EFFLER,
LEROY E. EASTMAN.

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IN THE

Supreme Court of the United States

No.....

THE SCOTT REALTY COMPANY,

Petitioner.

vs.

THE LASALLE & KOCH COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of The Scott Realty Company respectfully shows:

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

This is an action originally brought in the Court of Common Pleas of Lucas County, Ohio, by The Scott Realty Company, the plaintiff therein, to set aside, because of fraud and irregularities, an award of arbitrators appointed to determine the value of land under a 99-year lease made in 1916, in which The Scott Realty Company, plaintiff therein, is lessor, and The Lasalle & Koch Company, defendant therein, is lessee.

The real estate involved is the site of Toledo's largest

department store, operated by respondent, and is located at the southeast corner of Adams and Huron Streets in what is known as the 100% retail district. The original building of seven stories was built by petitioner expressly for respondent in 1916, pursuant to the terms of the lease. Three additional stories were added by respondent in 1927.

The lease provides for stipulated rentals to August 1, 1939. For the 10-year period commencing on that date, the real estate, exclusive of buildings and improvements, was to be valued for the purpose of determining rentals, the same to be 4% per annum of the fair market value.

The lease contained the following provisions for the purpose of determining the value of the real estate as the basis for the rentals:

> "If the parties hereto fail to agree upon such value within the time herein provided, then the same shall be determined by arbitration in the following manner:
>
> "Not less than sixty (60) days or more than ninety (90) days prior to the beginning of each of said periods, each of the parties hereto shall select a disinterested freeholder, resident of said City of Toledo, as an arbitrator, and the two so selected shall choose a third freeholder, resident of said city, and the three so selected shall within thirty (30) days prior to the beginning of the period next thereafter succeeding, *in joint session, by a majority vote, determine and fix the fair market value of said real estate*, exclusive of the buildings and improvements thereon, and return to each of the parties hereto, in writing, signed in duplicate by any two of them, the value so determined and fixed. The value so determined and returned as aforesaid shall be binding and conclusive as to the parties hereto for the period next thereafter succeeding. And said 'Lessee' shall pay said 'Lessor' each year four (4) per cent of said value in four (4) equal installments, in advance, on the 1st day of each of the months of August, November, February and May of each year of said period."
>
> (Lease, Pl's Ex. 19, R. pp. 379-380.)

Being unable to agree upon the value, the parties each appointed an arbitrator, and the two thus selected, being unable to agree as to a third, and the parties being likewise unable to agree as to a third, they joined, pursuant to the provisions of the lease, in an application to one of the judges of the Common Pleas Court asking for the appointment of a third man. The arbitrator selected by petitioner was George P. Crosby, and the arbitrator selected by respondent was Al E. Reuben, both experienced Toledo real estate brokers familiar with values in the 100% retail district. The Common Pleas judge appointed John A. Price, a Toledo attorney inexperienced in real estate and appraisal matters, as the third arbitrator.

At the time of the appointment of the arbitrators, the presidents of the respective corporations exchanged letters (Pl's Exs. 2 to 5, R. pp. 133-135) in which they stipulated that:

> "It is understood that the requirements of said lease that the three arbitrators shall be freeholders and residents of the City of Toledo have been waived by mutual consent of the parties only for the present arbitration. It is likewise understood for said purpose that the two arbitrators selected by the parties *shall not be deemed* disqualified on the ground of interest by reason of the fact that they respectively have been, or now are, representing the parties in real estate matters."

The two arbitrators had, theretofore, been managing other properties for the respective parties. Neither of them had ever had anything whatever to do with the property involved in this suit. Their handling of other properties embraced merely the collection of rentals, supervision of repairs, negotiations with tenants and other matters incidental to the care of investment property. Neither of them had authority to make leases or otherwise bind the parties.

PROCEEDINGS OF ARBITRATORS

The arbitrators held two meetings and only two. They held no joint session; held no hearings; had no joint discussion of the factors affecting value. Mr. Price was appointed by the Common Pleas judge as the third arbitrator on June 24, 1939. On that morning he was notified of his appointment by the attorneys for the parties, and was furnished with a copy of the joint application upon which his appointment was endorsed and with a copy of the lease.

Acting as chairman, Mr. Price called the other two arbitrators to his office on June 27, 1939, for their first meeting. No one else was present. They discussed only the procedure to be followed. (R. pp. 222-225, 243-246, 641-646, 677-680, 833-836, 890-896.) Mr. Price told Mr. Reuben and Mr. Crosby that he was inexperienced in real estate and appraisal matters, and requested that they give him their ideas of value and their reasons in support thereof. Mr. Crosby was ready to proceed; Mr. Reuben was not. It was then agreed among them that Mr. Crosby and Mr. Reuben, as a preliminary, should each present to Mr. Price a written statement, setting out their ideas of value and their reasons, and that after Mr. Price had the opportunity of studying these statements he should call another meeting for discussion and consideration of the matter. (R. p. 679.) Mr. Crosby stated that he could furnish his statement the next day, but Mr. Reuben said he would require about ten days to two weeks. (R. pp. 641-644.) Mr. Crosby's statement in the form of a letter (Pl's Ex. 18, R. p. 217), together with what he called "Survey of Toledo" (Pl's Ex. 17, R. p. 215), which he had previously prepared for the Woolworth Company, were filed with Mr. Price the next day. Mr. Reuben's written statement (Pl's Ex. 11, R. p. 205), together with a letter (Pl's Ex. 12, R. p. 205), were delivered to Mr. Price on July 10,

1939. Another letter (Pl's Ex. 13, R. pp. 205, 653, 654) was delivered by Mr. Reuben to Mr. Price on July 11, 1939, Mr. Price having asked him for a breakdown of his valuation. (R. pp. 641-654.)

On July 18, 1939, the second meeting was held at Mr. Price's office, Mr. Crosby having, at Mr. Price's request, returned from his vacation in Northern Michigan for the purpose. Mr. Reuben was already there. After a few minutes of personal conversation Mr. Price picked up a sheet of paper from his desk on which he had written his valuation, and announced that he had read the "briefs," had considered economic conditions, and had decided that Mr. Crosby was too high and Mr. Reuben was too low, and that he had arrived at his value of $950,000.00.* Mr. Crosby began questioning Mr. Price and told Mr. Price that he had ignored his written statement and the information which he had furnished. Mr. Reuben then said, "We are not here to argue the matter," and "I will meet that figure." Mr. Price filled in the figure of $950,000.00 in a form of award (Pl's Ex. 9, R. p. 150) which had been prepared and delivered to Mr. Price by respondent's attorney, and Mr. Price and Mr. Reuben proceeded to sign it in a number of counterparts. Mr. Crosby refused to sign it. Mr. Price sent a counterpart of the award to each of the parties the same day by registered mail. (R. pp. 225-228, 663-666, 741-748, 845-848, 890-898.)

REQUEST FOR HEARING

Before the arbitrators met in Mr. Price's office for the preliminary meeting, Mr. Erwin R. Effler, one of petitioner's counsel, telephoned Mr. Price and stated that petitioner desired to appear and be heard by the arbitrators

* Mr. Price testified that he considered himself an umpire and acted as such (R. p. 677). This is contrary to the terms of the lease, which called for joint deliberation and joint determination.

when they were ready, and asked Mr. Price to notify him or Mr. LeRoy Eastman, Mr. Effler's partner, when the hearing would take place. Mr. Price said he would take it up with the other men when they convened, and promised to notify Mr. Effler or Mr. Eastman (R. pp. 127, 128, 144), but did not do so, for which he apologized in his testimony at the trial. (R. p. 667.)

Mr. Price further testified that he would have preferred a hearing, but that when he informed the others of Mr. Effler's telephone request, they said they could get along without the help of lawyers, and so he permitted himself to be overruled. (R. p. 692.)

CONSPIRACY AND FRAUD

The moment it was agreed among the arbitrators at the first meeting, June 27, 1939, that preliminary written statements should be filed with Mr. Price (which it was agreed should set forth the individual views of the two arbitrators appointed by the parties), Mr. Lennihan, the vice-president of respondent, and Mr. Sanger, its secretary and general counsel, with the aid of its chief statistician and its chief accountant, conspired together and with Mr. Reuben to influence and impose upon Mr. Price. These officers and agents of respondent assembled so-called statistical data, charts, tables and graphs purporting to show economic and trade conditions, to be incorporated in Mr. Reuben's statement. This material was partly false and fictitious, and that part which was otherwise authentic was carefully, cunningly and adroitly revised, reconstructed and "correlated" so that instead of presenting a reasonably true picture of economic conditions, it painted an entirely opposite picture—one as black and depressive as they could possibly make it. (R. pp. 408-439, 488-566.) While representing that the information came from publications of established and recognized bureaus such as the Bulle-

tins of the Federal Reserve Board, the Toledo Business Review, published by the University of Toledo, and the Bulletins of the Bureau of Business Research of Ohio State University, they included data, tables, etc., which are not recognized or used by those established services, but so adroitly arranged, tabulated, indexed and identified with the claimed source as to create the impression that such data constituted official and dependable indices of economic conditions. They secretly deleted or withheld data which is recognized and used by those services and which indicated favorable conditions at the time. (R. pp. 488-566.) Meetings were held by the officers of respondent above enumerated, at which this so-called statistical data was carefully reviewed. (R. pp. 461-471.) These men secretly employed, or authorized Mr. Reuben to employ, two other realtors to prepare a document which was attached to Mr. Reuben's statement to Mr. Price. (R. p. 411.) This document was falsely represented to be an appraisal of the real estate in question and an advisory opinion previously rendered by these two realtors to the Lucas County Auditor in connection with a general reappraisal for tax purposes. (Pl's Ex. 11.) No disclosure was made to Mr. Price that these men were employed and paid by respondent. (R. p. 720.) Having collaborated and connived together to obtain this false "appraisal" and to assemble, reconstruct and "correlate" the false statistical data, Mr. Sanger, respondent's secretary and general counsel, proceeded to draft the Reuben statement, his authorship or participation therein being carefully concealed. (R. pp. 160-212.)

Besides the false and distorted statistical matter incorporated in and attached to it, the Reuben statement also contained glaring misrepresentations which were deliberately designed to mislead the third arbitrator. The more vicious of these misrepresentations may be briefly summarized as follows:

(a) It falsely showed that for the previous eight

years respondent had been suffering continuing losses. (Pl's Ex. 29, R. p. 390; Pl's Ex. 35, R. p. 433.)

(b) It falsely showed that department stores generally can afford to pay as rent no more than 4% of their annual net sales. (R. p. 481.)

(c) It falsely showed that respondent's rental costs for the year 1938 were in excess of 4.2% of its net sales for that year. (R. pp. 567-585.)

(d) It falsely showed that respondent's lease on adjoining premises (known as the Smith & Baker property) was unprofitable and burdensome. (Pl's Ex. 29, R. p. 390; Pl's Ex. 36, R. p. 435; Pl's Ex. 38, R. p. 571; Pl's Exs. 66 to 71, R. p. 848; Pl's Exs. 91 to 96F, R. pp. 906-912.)

(e) It falsely showed that one of respondent's competitors (The Lamson Bros. Co.) whose store is located about a block away, outside the 100% retail district but of comparable area, the land being held under 99-year lease at a ground rental of $68,250.00 net per year, was obliged to ask its landlord for relief and had succeeded in getting a reduction in its rentals of approximately 40%. (Pl's Exs. 20, 21, 22, R. p. 440.)

All of these statements, and many others of similar import, were absolutely false and misleading as shown by the admissions of respondent's officers, by its own books and other record evidence. Mr. Price accepted the whole thing as true. He so testified. (R. pp. 719-721.) That he was completely misled is evident from the palpable inadequacy of the award.

Neither petitioner nor Mr. Crosby ever saw the Reuben statement until after the award was made and until after this suit was filed, and, hence, had no opportunity to refute the false statements and misrepresentations it contained. (R. p. 738.)

Mr. Crosby adhered to the agreement of the arbitrators in letter and in spirit. He prepared his own statement in the form of a layman's letter without help from anyone.

PROCEEDINGS IN THE STATE COURTS

The award complained of was made on July 18, 1939, signed by Messrs. Price and Reuben, and was in the amount of $950,000.00. (Pl's Ex. 9, pp. 150, 660.) On July 29, 1939, petitioner notified respondent by letter (Pl's Ex. 10, R. pp. 156, 157) that the arbitration was illegal and void, and that petitioner refused to be bound thereby. This suit was filed on August 7, 1939.

COMMON PLEAS COURT

The second amended petition set forth two causes of action,—the first to set aside the award because of fraud and conspiracy to impose upon and mislead the third arbitrator and because the arbitrators departed from the submission and did not accord the parties a hearing, and the second for a determination of the value of the land as a basis for the rents. (R. p. 1.)

After an extended trial, the Common Pleas Court set aside the award and determined the value of the real estate, exclusive of buildings and improvements, at $1,500,000.00. (R. p. 30.)

COURT OF APPEALS

On a trial *de novo,* substantially on the record made in the Common Pleas Court, the Court of Appeals of Lucas County, Ohio, on July 3, 1942, upheld the award of the arbitrators and entered judgment dismissing petitioner's second amended petition. (R. pp. 120, 122.) Having found against petitioner on the first cause of action, which was to set aside the award, the Court of Appeals did not consider the second cause of action. The finding of the Common Pleas Court as to the value of the land was not reviewed. (R. p. 117.)

After the Court of Appeals announced its decision and before the entry of judgment, petitioner made application, under Section 12223-30 of the Ohio General Code and Rule

IX of the Rules of Practice of the Court of Appeals, for special findings of fact (R. p. 45), and submitted to the court proposed findings (R. pp. 60-106) and special written interrogatories involving the ultimate facts and the material probative facts from which the ultimate facts might be inferred (R. pp. 47-59.) The Court of Appeals refused to answer the interrogatories (R. p. 118), and adopted verbatim the so-called findings of fact prepared by respondent's counsel, which consist of a number of general findings mixed with conclusions of law and omit the essential probative facts. (R. pp. 108-117.)

SUPREME COURT OF OHIO

Petitioner, on July 22, 1942, pursuant to Section 12223-4, General Code of Ohio, filed its written notice of appeal in said Court of Appeals (R. p. 122) and in the Supreme Court of Ohio (R. p. 928), thus appealing from the findings, judgment and decree of said Court of Appeals. In said notices of appeal it was stated:

> "Said appeal is on questions of law and is taken to the Supreme Court (a) in a case involving a debatable constitutional question, and (b) on condition that a motion to certify be allowed by the Supreme Court."

Petitioner accordingly appealed as of right to the Supreme Court of Ohio on the constitutional grounds and also filed its motion for an order directing the Court of Appeals to certify the record, all pursuant to Article IV, Section 2, of the Ohio Constitution. On December 16, 1942, the Supreme Court of Ohio entered its judgment dismissing the appeal as of right on the sole ground that "no debatable constitutional question is involved" (R. p. 937), and on the same date entered its order overruling petitioner's motion to certify the record. (R. p. 937.) Application for rehearing was seasonably made, which was denied on January 6, 1943. (R. p. 938.)

STATEMENT OF JURISDICTION

This Court has jurisdiction as provided in Title 28 U. S. C., Section 344, paragraph (b), Section 237, Judicial Code, as amended, to review on *certiorari* the judgment of the Court of Appeals of Lucas County, Ohio, above referred to, entered July 3, 1942. The judgment and order of the Supreme Court of Ohio, entered December 16, 1942, in effect affirmed the judgment of the Court of Appeals and made it final. The judgment of the Court of Appeals deprived petitioner of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

See *Chesapeake & Ohio Railway Co. vs. Mihas*, 280 U. S. 102;
Tumey vs. State of Ohio, 273 U. S. 510;
Hetrick vs. Village of Lindsey et al., 265 U. S. 384.

Article IV, Section 2, of the Ohio Constitution, so far as pertinent, is as follows:

> "It (the Supreme Court of Ohio) shall have * * * appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state, * * *.' In cases of public or great general interest the supreme court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the supreme court, and may review, and affirm, modify or reverse the judgment of the court of appeals. * * *"

The judgment of the Court of Appeals, which is sanctioned and affirmed by the judgment and order of the Supreme Court of Ohio, is a denial of petitioner's right to due process in two respects, namely:

(a) The Court of Appeals sanctioned and upheld the award of the arbitrators made and procured without a hearing before said arbitrators. It is, and was at the time the

lease in question was executed, the law of Ohio, as declared by the Supreme Court of Ohio in *Worthington vs. Hewes & McCann*, 19 Ohio St. 66, that an award of arbitrators appointed to value land under a 99-year lease is void unless a hearing is accorded the parties where such hearing is reasonably practicable. Under Ohio law, therefore, a hearing before the arbitrators was an essential element of due process. There was no hearing accorded petitioner, although a hearing was expressly requested by petitioner's attorney. By means of the conspiracy and fraud above recited respondent procured for itself an *ex parte* hearing. Respondent's officers and agents were permitted to submit, surreptitiously, evidence to the third arbitrator, with no opportunity for petitioner to cross examine or to refute the false statements made.

(b) The other errors of the Court of Appeals are so gross and obvious as to amount to arbitrary and capricious exercise of power. For example, the Court of Appeals

(1) Made arbitrary findings of fact which are not supported by any evidence whatsoever, and are contrary to the undisputed evidence;

(2) Made arbitrary findings of fact which are contrary to the admissions of respondent's own officers and agents and contrary to the facts shown by respondent's own books and records;

(3) Arbitrarily assumed that the officers and attorneys of the parties had the inherent power and authority to bind the parties, both corporations, to a material departure from and modification of the provisions of the 99-year lease, so that the requirements of joint session, joint deliberation and joint determination of the value of the land were dispensed with and the third arbitrator became the umpire. There is no evidence of such authority or of any prior course of dealing by the parties, and it is the settled law of Ohio

that, in the absence of express authority conferred upon its officers and agents or of such a course of dealing with the other party as clearly implies authority, a corporation can be bound only by its Board of Directors. *Bradford Belting Company vs. Gibson,* 68 Ohio St. 442; *Kroeger, Superintendent of Building & Loan Associations, et al. vs. Brody, Trustee,* 130 Ohio St. 559; *State, ex rel. Squire, Superintendent of Banks, vs. Frasier et al.,* 133 Ohio St. 283; *Storms vs. United Grain & Millworkers' Union,* 64 Ohio App. 19; *Royal Indemnity Company vs. McFadden et al.,* 65 Ohio St. 15;

(4) Arbitrarily held that the two arbitrators selected by the parties were the agents and representatives of the parties, with authority to bind the parties to a departure from the terms and requirements of the lease and so as to justify the crafty machinations of respondent above set forth.

Other gross and obvious errors of the Court of Appeals are pointed out in the supporting brief.

It is contended on the showing herein made that the federal questions involved are substantial. The federal questions were raised by notice of appeal filed in the Court of Appeals July 22, 1942 (R. p. 122), and by similar notice filed on the same date in the Supreme Court of Ohio (R. p. 928), and by assignment of errors filed in the Supreme Court of Ohio August 6, 1942 (R. p. 934), and by application for rehearing filed in the Supreme Court of Ohio December 30, 1942. (R. p. 935.) The assignment of errors makes specific reference to petitioner's claim that the findings, orders, judgment and decree of the Court of Appeals in sustaining said award violated petitioner's right to due process of law under Section 1 of the Fourteenth Amendment of the Constitution of the United States in that:

"(a) Appellant was denied a hearing before said arbitrators;

"(b) The errors of the Court of Appeals are so gross and obvious as to amount to arbitrary and capricious exercise of power." (R. p. 931.)

The application for rehearing filed in the Supreme Court likewise makes specific reference to the violation of the Fourteenth Amendment.

These federal questions were passed upon adversely by the Supreme Court of Ohio by its judgment and order of December 16, 1942, and by its decision of January 6, 1943, in which the application for rehearing was denied.

The Supreme Court of Ohio rendered no opinions. The Court of Appeals opinion is attached as an appendix to the supporting brief. The Court of Appeals opinion is not officially reported.

QUESTIONS PRESENTED

The questions presented to the court in this case are these:

(1) Where the settled law of Ohio as declared by the long standing decision of its highest court, requires that arbitrators in determining the value of land under a 99-year lease shall accord the parties a hearing whenever practicable as a condition to the validity of their award, is not such hearing an essential element of due process so that the enforcement by the state courts of an award made without hearing constitutes a denial to petitioner of due process of law under Section 1 of the Fourteenth Amendment?

(2) Where the judgment of the state court is based upon arbitrary findings of fact, unsupported by any evidence and contrary to the undisputed evidence, has not petitioner's right to due process of law been denied?

(3) Where the judgment of the state court is based upon errors so gross and obvious as to border on arbitrary

action, has not petitioner's right to due process of law been denied?

ASSIGNMENTS OF ERROR

The Supreme Court of Ohio erred:

(1) In dismissing petitioner's appeal as of right;

(2) In overruling petitioner's motion for an order requiring the Court of Appeals to certify its record for review, so that under the law of Ohio the judgment of the Court of Appeals became final;

(3) In denying petitioner's application for rehearing.

The Court of Appeals of Lucas County, Ohio, erred:

(1) In finding and adjudging in favor of respondent and against petitioner;

(2) In sustaining the award of the arbitrators, which was made and procured without a hearing being accorded petitioner, was induced by fraud of respondent, was arrived at contrary to the terms of the submission and by means of an *ex parte* hearing accorded respondent;

(3) In making arbitrary findings unsupported by any evidence and contrary to the undisputed evidence.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner respectfully urges that the writ should issue because:

(1) In dismissing petitioner's appeal as of right and overruling petitioner's motion to require the Court of Appeals to certify the record, the Supreme Court of Ohio erroneously decided questions arising under the Fourteenth Amendment to the Federal Constitution adversely to petitioner's contentions and, it is believed, contrary to the decisions of this Court.

(2) Under our system of jurisprudence arbitrary and capricious action by our courts is intolerable. The errors of the Ohio Court of Appeals in this case are so gross and

obvious as to constitute arbitrary action and a denial of due process to petitioner.

(3) The determination of the issues arising in this case not only affects petitioner's property rights, which are of great value, but likewise affects similar proceedings which will be required at periodic intervals in the future under its 99-year lease, and likewise affects innumerable similar leases not only in the State of Ohio but throughout the nation.

There is filed herewith the brief of petitioner in support of this petition for writ of *certiorari,* to which reference is respectfully made for discussion of the law involved and of the authorities in support of the rights claimed on behalf of petitioner.

Wherefore, your petitioner respectfully requests that this Court issue a writ of *certiorari* to the Supreme Court of the State of Ohio [redacted] to certify and send to this Court a full and complete transcript of the record herein to the end that the cause may be reviewed and determined by this Court as provided by law, and that the judgment and decree may be reversed with costs, and for such other and further relief as may be appropriate and granted in the premises.

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(11)

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IN THE

Supreme Court of the United States

No. 803

THE SCOTT REALTY COMPANY,

Petitioner.

vs.

THE LASALLE & KOCH COMPANY,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

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PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

OPINIONS IN COURTS BELOW

The Supreme Court of Ohio delivered no opinions. The Court of Appeals of Lucas County, Ohio, delivered an opinion dated April 27, 1942. It has not been officially reported. A copy of this opinion is attached to this brief as an appendix.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This Court has jurisdiction as provided in Title 28 U. S. C., Section 344, paragraph (b), Section 237, Judicial Code, as amended, to review on *certiorari* the judgment of the Court of Appeals of Lucas County, Ohio, entered July 3, 1942. (R. pp. 120-122). The judgment and order of the Supreme Court of Ohio, entered December 16, 1942, (R. p.

All forms of emphasis in this brief are ours unless the contrary is indicated.

937) in effect affirmed the judgment of the Court of Appeals and made it final. The judgment of the Court of Appeals deprived petitioner of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

See *Chesapeake & Ohio Railway Co. vs. Mihas*, 280 U. S. 102;
Tumey vs. State of Ohio, 273 U. S. 510;
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The pertinent Sections of the General Code of Ohio, so far as applicable, are as follows:

> "Sec. 12223-4. The appeal shall be deemed perfected when written notice of appeal shall be filed with the lower court, tribunal, officer or commission. Where leave to appeal must be first obtained, notice of appeal shall also be filed in the appellate court. * * *"
>
> "Sec. 12223-7. The period of time after the entry of the order, judgment, decree, or other matter for review within which the appeal shall be perfected, unless otherwise provided by law, is as follows:
>
> "1. In appeals to the supreme court, to courts of appeals, or from municipal courts and from probate courts to courts of common pleas, within twenty (20) days.
>
> "* * *"

The judgment of the Court of Appeals, which is sanctioned and affirmed by the judgment and order of the Supreme Court of Ohio, is a denial of petitioner's right to due process in two respects, namely:

(a) The Court of Appeals sanctioned and upheld the award of the arbitrators made and procured without a hearing before said arbitrators. It is, and was at the time the lease in question was executed, the law of Ohio, as declared by the Supreme Court of Ohio in *Worthington vs. Hewes & McCann*, 19 Ohio St., 66 (1869), that an award of arbitrators appointed to value land under a 99-year lease is void unless a hearing is accorded the parties where such hearing is reasonably practicable. Under Ohio law, therefore, a hearing before the arbitrators was an essential element of due process. There was no hearing accorded petitioner, although a hearing was expressly requested by petitioner's attorney.

By means of the conspiracy and fraud below recited, respondent procured for itself an *ex parte* hearing. Respondent's officers and agents were permitted to submit, surreptitiously, evidence to the third arbitrator, with no opportunity for petitioner to cross examine or to refute the false statements made.

(b) The other errors of the Court of Appeals are so gross and obvious as to amount to arbitrary and capricious exercise of power.

These errors of the Court of Appeals, including the arbitrary findings of fact which are not supported by any evidence whatsoever or which are contrary to the undisputed evidence, are discussed later in this brief.

The federal questions were raised by Notice of Appeal filed in the Court of Appeals July 22, 1942 (R. p. 122), and by similar notice filed on the same date in the Supreme Court of Ohio (R. p. 928), and by Assignment of Errors

filed in the Supreme Court of Ohio August 6, 1942 (R. p. 930), and by Application for Rehearing filed in the Supreme Court of Ohio December 30, 1942. (R. p. 936.) The assignment of errors makes specific reference to petitioner's claim that the findings, orders, judgment and decree of the Court of Appeals in sustaining said award violated petitioner's right to due process of law under Section 1 of the Fourteenth Amendment of the Constitution of the United States in that:

> "(a) Appellant was denied a hearing before said arbitrators;
>
> "(b) The errors of the Court of Appeals are so gross and obvious as to amount to arbitrary and capricious exercise of power." (R. p. 931).

The application for rehearing filed in the Supreme Court likewise makes specific reference to the violation of the Fourteenth Amendment.

These federal questions were passed upon adversely by the Supreme Court of Ohio by its judgment and order of December 16, 1942, and by its decision of January 6, 1943, in which the application for rehearing was denied. (R. p. 938.)

STATEMENT OF CASE

This is an action originally brought in the Court of Common Pleas of Lucas County, Ohio, by The Scott Realty Company, the plaintiff therein, to set aside, because of fraud and irregularities, an award of arbitrators appointed to determine the value of land under a 99-year lease made in 1916, in which The Scott Realty Company, plaintiff therein, is lessor, and The Lasalle & Koch Company, defendant therein, is lessee.

The real estate involved is the site of Toledo's largest department store, operated by respondent, and is located

at the southeast corner of Adams and Huron Streets in what is known as the 100% retail district. The original building of seven stories was built by petitioner expressly for respondent in 1916, pursuant to the terms of the lease. Three additional stories were added by respondent in 1927.

The lease provides for stipulated rentals to August 1, 1939. For the 10-year period commencing on that date, the real estate, exclusive of buildings and improvements, was to be valued for the purpose of determining rentals, the same to be 4% per annum of the fair market value.

The lease contained the following provisions for the purpose of determining the value of the real estate as the basis for the rentals:

> "If the parties hereto fail to agree upon such value within the time herein provided, then the same shall be determined by arbitration in the following manner:
>
> "Not less than sixty (60) days or more than ninety (90) days prior to the beginning of each of said periods, each of the parties hereto shall select a disinterested freeholder, resident of said City of Toledo, as an arbitrator, and the two so selected shall choose a third freeholder, resident of said city, and the three so selected shall within thirty (30) days prior to the beginning of the period next thereafter succeeding, *in joint session, by a majority vote, determine and fix the fair market value of said real estate*, exclusive of the buildings and improvements thereon, and return to each of the parties hereto, in writing, signed in duplicate by any two of them, the value so determined and fixed. The value so determined and returned as aforesaid shall be binding and conclusive as to the parties hereto for the period next thereafter succeeding. And said 'Lessee' shall pay said 'Lessor' each year four (4) per cent. of said value in four (4) equal installments, in advance, on the 1st day of each of the months of August, November, February and May of each year of said period."
>
> (Lease, Pl's. Ex. 19, R. pp. 379-380)

Being unable to agree upon the value, the parties each appointed an arbitrator, and the two thus selected, being unable to agree as to a third, and the parties being likewise unable to agree as to a third, they joined, pursuant to the provisions of the lease, in an application to one of the Judges of the Common Pleas Court asking for the appointment of a third man. The arbitrator selected by petitioner was George P. Crosby, and the arbitrator selected by respondent was Al E. Reuben, both experienced Toledo real estate brokers familiar with values in the 100% retail district. The Common Pleas Judge appointed John A. Price, a Toledo attorney inexperienced in real estate and appraisal matters, as the third arbitrator.

At the time of the appointment of the arbitrators, the Presidents of the respective corporations exchanged letters (Pl's Exs. 2 to 5, R. pp. 133-135) in which they stipulated:

> "It is understood that the requirements of said lease that the three arbitrators shall be freeholders and residents of the city of Toledo have been waived by mutual consent of the parties only for the present arbitration. It is likewise understood for said purpose that the two arbitrators selected by the parties *shall not be deemed* disqualified on the ground of interest by reason of the fact that they respectively have been, or now are, representing the parties in real estate matters."

The two arbitrators had, theretofore, been managing other properties for the respective parties. Neither of them had ever had anything whatever to do with the property involved in this suit. Their handling of other properties embraced merely the collection of rentals, supervision of repairs, negotiations with tenants and other matters incidental to the care of investment property. Neither of them had authority to make leases or otherwise bind the parties. (R. p. 214.)

PROCEEDINGS OF ARBITRATORS

The arbitrators held two meetings and only two. They held no joint session; held no hearings; had no joint discussion of the factors affecting value. Mr. Price was appointed by the Common Pleas Judge as the third arbitrator on June 24, 1939. On that morning he was notified of his appointment by the attorneys for the parties, and was furnished with a copy of the joint application upon which his appointment was endorsed and with a copy of the lease. (R. pp. 126-127, 639-641.)

Acting as Chairman, Mr. Price called the other two arbitrators to his office on June 27, 1939, for their first meeting. No one else was present. They discussed only the procedure to be followed. (R. pp. 222-225, 243-246, 641-646, 677-680, 833-836, 890-896.) Mr. Price told Mr. Reuben and Mr. Crosby that he was inexperienced in real estate and appraisal matters, and requested that they give him their ideas of value and their reasons in support thereof. Mr. Crosby was ready to proceed; Mr. Reuben was not. It was then agreed among them that Mr. Crosby and Mr. Reuben, as a preliminary, should each present to Mr. Price a written statement, setting out their ideas of value and their reasons, and that after Mr. Price had the opportunity of studying these statements he should call another meeting for discussion and consideration of the matter. (R. p. 679.) Mr. Crosby stated that he could furnish his statement the next day, but Mr. Reuben said he would require about ten days to two weeks. (R. pp. 641-644.) Mr. Crosby's statement in the form of a letter (Pl's. Ex. 18, R. p. 217), together with what he called "Survey of Toledo" (Pl's. Ex. 17, R. p. 215), which he had previously prepared for the Woolworth Company, were filed with Mr. Price the next day. Mr. Reuben's written statement (Pl's. Ex. 11, R. p. 205), together with a letter (Pl's Ex. 12, R. p. 205), were delivered to Mr. Price

on July 10, 1939. Another letter (Pl's Ex. 13, R. pp. 205. 653, 654) was delivered by Mr. Reuben to Mr. Price on July 11, 1939, Mr. Price having asked him for a breakdown of his valuation. (R. pp. 641-654.)

On July 18, 1939, the second meeting was held at Mr. Price's office, Mr. Crosby having, at Mr. Price's request, returned from his vacation in Northern Michigan for the purpose. Mr. Reuben was already there. After a few minutes of personal conversation Mr. Price picked up a sheet of paper from his desk on which he had written his valuation, and announced that he had read the "briefs," had considered economic conditions, and had decided that Mr. Crosby was too high and Mr. Reuben was too low, and that he had arrived at his value of $950,000.00.* Mr. Crosby began questioning Mr. Price and told Mr. Price that he had ignored his written statement and the information which he had furnished. Mr. Reuben then said, "We are not here to argue the matter," and "I will meet that figure." Mr. Price filled in the figure of $950,000.00 in a form of award (Pl's. Ex. 9, R. p. 150) which had been prepared and delivered to Mr. Price by respondent's attorney, and Mr. Price and Mr. Reuben proceeded to sign it in a number of counterparts. Mr. Crosby refused to sign it. Mr. Price sent a counterpart of the award to each of the parties the same day by registered mail. (R. pp. 225-228, 663-666, 741-748, 845-848, 890-898.)

REQUEST FOR HEARING

Before the arbitrators met in Mr. Price's office for the preliminary meeting, Mr. Erwin R. Effler, one of petitioner's counsel, telephoned Mr. Price and stated that petitioner desired to appear and be heard by the arbitrators when

* Mr. Price testified that he considered himself an umpire and acted as such (R. p. 677). This is contrary to the terms of the lease, which called for joint deliberation and joint determination.

they were ready, and asked Mr. Price to notify him or Mr. LeRoy Eastman, Mr. Effler's partner, when the hearing would take place. Mr. Price said he would take it up with the other men when they convened, and promised to notify Mr. Effler or Mr. Eastman (R. pp. 127, 128, 144), but did not do so, for which he apologized in his testimony at the trial. (R. p. 667.)

Mr. Price further testified that he would have preferred a hearing, but that when he informed the others of Mr. Effler's telephone request, they said they could get along without the help of lawyers, and so he permitted himself to be overruled. (R. p. 692.)

CONSPIRACY AND FRAUD

The moment it was agreed among the arbitrators at the first meeting, June 27, 1939, that preliminary written statements should be filed with Mr. Price (which it was agreed should set forth the individual views of the two arbitrators appointed by the parties), Mr. Lennihan, the Vice-President of respondent, and Mr. Sanger, its Secretary and general counsel, with the aid of its Chief Statistician and its Chief Accountant, conspired together and with Mr. Reuben to influence and impose upon Mr. Price. These officers and agents of respondent assembled so-called statistical data, charts, tables and graphs purporting to show economic and trade conditions, to be incorporated in Mr. Reuben's statement. This material was partly false and fictitious, and that part which was otherwise authentic was carefully, cunningly and adroitly revised, reconstructed and "correlated" so that instead of presenting a reasonably true picture of economic conditions, it painted an entirely opposite picture—one as black and depressive as they could possibly make it. (R. pp. 408-439, 488-566.) While representing that the information came from publications of

established and recognized bureaus such as the Bulletins of the Federal Reserve Board, the Toledo Business Review, published by the University of Toledo, and the Bulletins of the Bureau of Business Research of Ohio State University, they included data, tables, etc., which are not recognized or used by those established services, but so adroitly arranged, tabulated, indexed and identified with the claimed source as to create the impression that such data constituted official and dependable indices of economic conditions. They secretly deleted or withheld data which is recognized and used by those services and which indicated favorable conditions at the time. (R. pp. 488-566.) Meetings were held by the officers of respondent above enumerated, at which this so-called statistical data was carefully reviewed. (R. pp. 461-471.) These men secretly employed, or authorized Mr. Reuben to employ, two other realtors to prepare a document which was attached to Mr. Reuben's statement to Mr. Price. (R. p. 411.) This document was falsely represented to be an appraisal of the real estate in question and an advisory opinion previously rendered by these two realtors to the Lucas County Auditor in connection with a general reappraisal for tax purposes. (Pl's. Ex. 11.) No disclosure was made to Mr. Price that these men were employed and paid by respondent. (R. p. 720.) Having collaborated and connived together to obtain this false "appraisal" and to assemble, reconstruct and "correlate" the false statistical data, Mr. Sanger, respondent's Secretary and general counsel, proceeded to draft the Reuben statement, his authorship or participation therein being carefully concealed. (R. pp. 160-212.)

Besides the false and distorted statistical matter incorporated in and attached to it, the Reuben statement also contained glaring misrepresentations which were deliberately designed to mislead the third arbitrator. The more

vicious of these misrepresentations may be briefly summarized as follows:

(a) The statement falsely showed that for the previous eight years respondent had been suffering continuing losses. (Pl's. Ex. 29, R. p. 390; Pl's. Ex. 35, R. p. 433.)

(b) It falsely showed that department stores generally can afford to pay as rent no more than 4% of their annual net sales. (R. p. 481.)

(c) It falsely showed that respondent's rental costs for the year 1938 were in excess of 4.2% of its net sales for that year. (R. pp. 567-585.)

(d) It falsely showed that respondent's lease on adjoining premises (known as the Smith & Baker property) was unprofitable and burdensome (Pl's. Ex. 29, R. p. 390; Pl's. Ex. 36, R. p. 435; Pl's. Exs. 66 to 71, R. p. 848; Pl's. Exs. 91 to 96 F, R pp. 906-912.)

(e) It falsely showed that one of respondent's competitors (The Lamson Bros. Co.) whose store is located about a block away, outside the 100% retail district but of comparable area, the land being held under 99-year lease at a ground rental of $68,250.00 net per year, was obliged to ask its landlord for relief and had succeeded in getting a reduction in its rentals of approximately 40%. (Pl's. Exs. 20, 21, 22, R. p. 440.)

All of these representations, and many others of similar import, were absolutely false and misleading as shown by the admissions of respondent's officers, by its own books and other record evidence. Mr. Price accepted the whole thing as true. He so testified (R. pp. 719-721). That he was completely misled is evident from the palpable inadequacy of the award.

Neither petitioner nor Mr. Crosby ever saw the Reuben

statement until after the award was made and until after this suit was filed, and, hence, had no opportunity to refute the false statements and misrepresentations it contained. (R. p. 738.)

Mr. Crosby adhered to the agreement of the arbitrators in letter and in spirit. He prepared his own statement in the form of a layman's letter without help from anyone.

PROCEEDINGS IN THE STATE COURTS

The award complained of was made on July 18, 1939, signed by Messrs. Price and Reuben, and was in the amount of $950,000.00. (Pl's Ex. 9, R. pp. 150, 660.) On July 29, 1939, petitioner notified respondent by letter (Pl's. Ex. 10, R. pp. 156, 157) that the arbitration was illegal and void, and that petitioner refused to be bound thereby. This suit was filed on August 7, 1939.

COMMON PLEAS COURT

The second amended petition set forth two causes of action,—the first to set aside the award because of fraud and conspiracy to impose upon and mislead the third arbitrator and because the arbitrators departed from the submission and did not accord the parties a hearing, and the second for a determination of the value of the land as a basis for the rents. (R. p. 1.)

After an extended trial, the Common Pleas Court set aside the award and determined the value of the real estate, exclusive of buildings and improvements, at $1,500,000.00. (R. p. 30.)

COURT OF APPEALS

On a trial *de novo*, substantially on the record made in the Common Pleas Court, the Court of Appeals of Lucas County, Ohio, on July 3, 1942, upheld the award of the arbitrators and entered judgment dismissing petitioner's second amended petition. (R. pp. 120, 122.) Having found against petitioner on the first cause of action, which was to set aside the award, the Court of Appeals did not consider the second cause of action. The finding of the Common Pleas Court as to the value of the land was not reviewed. (R. p. 117.)

After the Court of Appeals announced its decision and before the entry of judgment, petitioner made application, under Section 12223-30 of the Ohio General Code and Rule IX of the Rules of Practice of the Court of Appeals, for special findings of fact (R. p. 45), and submitted to the court proposed findings (R. pp. 60-106) and special written interrogatories involving the ultimate facts and the material probative facts from which the ultimate facts might be inferred. (R. pp. 47-59.) The Court of Appeals refused to answer the interrogatories (R. p. 118), and adopted verbatim the so-called findings of fact prepared by respondent's counsel, which consist of a number of general findings mixed with conclusions of law and omit the essential probative facts. (R. pp. 108-117.)

SUPREME COURT OF OHIO

Petitioner, on July 22, 1942, pursuant to Section 12223-4, General Code of Ohio, filed its written Notice of Appeal in said Court of Appeals (R. p. 122) and in the Supreme Court of Ohio (R. p. 928), thus appealing from the findings, judgment and decree of said Court of Appeals. In said notices of appeal it was stated:

> "Said appeal is on questions of law and is taken to the Supreme Court (a) in a case involving a

debatable constitutional question, and (b) on condition that a motion to certify be allowed by the Supreme Court."

Petitioner accordingly appealed as of right to the Supreme Court of Ohio on the constitutional grounds and also filed its motion for an order directing the Court of Appeals to certify the record, all pursuant to Article IV, Section 2, of the Ohio Constitution. On December 16, 1942, the Supreme Court of Ohio entered its judgment dismissing the appeal as of right on the sole ground that "no debatable constitutional question is involved" (R. p. 937), and on the same date entered its order overruling petitioner's motion to certify the record. (R. p. 937.) Application for rehearing was seasonably made, which was denied on January 6, 1943. (R. p. 938.)

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

Petitioner intends to urge each of the errors assigned in the Assignment of Errors filed in this Court as part of the Petition for Writ of *Certiorari*.

ARGUMENT AS TO FACTS AND LAW

I. THE JUDGMENT OF THE COURT OF APPEALS VIOLATES SECTION 1 OF THE FOURTEENTH AMENDMENT

1. The Judgment Upholds the Award of the Arbitrators Made Without a Hearing Being Accorded Petitioner (pp. 16 to 18 hereof).
2. The Judgment Is Based Upon Other Errors so Gross and Obvious as to Amount to Arbitrary and Capricious Action. This Is Shown by the Following:

(1) By an Examination of the Court's Opinion (pp. 19 to 29 hereof).

(2) The Court Refused to Make Findings of Fact, Including the Material Probative Facts Requested Pursuant to Section 12223-30, General Code of Ohio (pp. 29 to 31 hereof).

(3) The Court Made General Findings of Fact Mixed with Conclusions of Law, Unsupported by Any Evidence and Contrary to the Undisputed Evidence (pp. 31 to 33 hereof).

(4) The Court Ignored the Settled Rule that an Arbitrator Is Not the Agent of the Party Appointing Him and that He Owes the Parties Impartiality, Honesty and Good Faith (pp. 33 to 40 hereof).

II. THE AWARD IS ILLEGAL AND VOID

1. Grounds for Vacating Award (pp. 40 and 41 hereof).
2. Nature of Submission to Arbitrators (pp. 41 and 42 hereof).
3. A Hearing of the Parties before the Arbitrators Was Required by Law (pp. 42 to 45 hereof).
4. The Arbitrators Ignored Petitioner's Request for a Hearing (p. 46 hereof).
5. Respondent Was Given an *Ex Parte* Hearing before the Arbitrators (pp. 46 to 49 hereof).
6. Mr. Price Acted as Umpire, Not as Third Arbitrator as Required by Lease (pp. 49 and 50 hereof).
7. The Award Is Grossly and Palpably Inadequate (pp. 51 and 52 hereof).
8. The Award Is Tainted with Conspiracy and Fraud (pp. 52 and 53 hereof).
9. The Award Was the Result of Fundamental Mistakes on the Part of Mr. Price (pp. 53 to 56 hereof).

1. The Judgment Upholds the Award of the Arbitrators Made without a Hearing Being Accorded Petitioner

The court absolutely and completely disregards, ignores and nullifies the salutary rule laid down by the Supreme Court of Ohio in the case of *Worthington vs. Hewes & McCann*, 19 Ohio St. 66 (1869), that a proceeding of the character here in question is of the importance of a strict arbitration, and that the parties are not bound unless given the opportunity to be heard. The Court of Appeals thus sanctions the violation of petitioner's fundamental right. The violation of this right and the injury done to petitioner by the court's decision is quite as serious as if the court itself had refused to give petitioner a hearing.

In its findings the Court of Appeals said there was a hearing, but it will be noted that the court failed to find any probative facts and refused to answer petitioner's interrogatories directed to that issue. **There is no evidence whatever to support that finding. No one, not even the Court of Appeals, pretends that there was a hearing except through the medium of the written statements presented to Mr. Price, the third arbitrator, by Messrs. Crosby and Reuben.** This obviously was not a hearing accorded to petitioner. These written statements were intended to be merely preliminary.

The Reuben statement was framed to provide an *ex parte* hearing to respondent, because respondent's officers, accountants, statisticians and secretly employed real estate experts were permitted to testify. Mr. Crosby prepared his own statement, and at no time did petitioner have an opportunity to know or refute the evidence secretly presented by respondent through the Reuben statement.

> "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."
>
> *Brinkerhoff- Faris Trust & Savings Company vs. Hill, etc.*, 281 U. S. 673, Syllabus 3.

This Court in *Interstate Commerce Commission vs. Louisville and Nashville Railroad Co.*, 227 U. S. 88, says:

> "Administrative orders *quasi*-judicial in character are void if a hearing is denied; if the hearing granted is manifestly unfair; * * *." (P. 88.)

Proceedings of arbitrators are *quasi*-judicial in character. The requirement of a hearing is no less essential than if the proceeding is before an administrative tribunal established by law. *Ormsby Admr's vs. Bakewell*, 7 Ohio 98; *Springfield vs. Waters*, 42 Ohio St. 543; *Corrigan vs. Rockefeller*, 67 Ohio St. 354; *Worthington vs. Hewes & McCann, supra.*

In *State of Washington ex rel. Oregon Railroad and Navigation Co. vs. Fairchild et al.*, 224 U. S. 510, it is said:

> "The hearing which must precede an order taking property must not be a mere form, but one which gives the owner the right to secure and present material evidence; * * *."

In the instant case, respondent presented its evidence but petitioner was given no such opportunity, nor did it have any knowledge of the matters presented by respondent or any opportunity to refute the same.

The due process of law guaranteed by the Fourteenth Amendment has regard to the substance of right and not to matters of form or procedure. *Chicago B. & Q. R. Co. vs. Chicago*, 116 U. S. 226; *Frank vs. Mangum*, 237 U. S. 309.

The essential elements of due process are notice and opportunity to defend. *Simon vs. Kraft*, 182 U. S. 427; *Orchard vs. Alexander*, 157 U. S. 372; *Twining vs. New Jersey*, 211 U. S. 78; *Jacob vs. Roberts*, 223 U. S. 261; *Garfield vs. United States*, 211 U. S. 249; *Scott vs McNeal*, 154 U. S. 34.

In *Brown vs. Lyddy*, (N. Y., 1877) 11 Hun. 451, there was involved a lease containing a privilege of renewal,

and providing that if the parties were unable to agree upon the rent, the value of the land was to be ascertained by appraisers, and that 5% of the value so ascertained should be paid as rent. It was claimed by one of the parties that he had been deprived of a hearing by the appraisers. In its opinion the court says:

> "* * * The right of the parties to a hearing, and to produce witnesses, is one of the established privileges (*Elmendorf vs. Harris,* 23 Wend. 628), * * *."

In view of the fact that the *Worthington* case, *supra,* represented the settled law of Ohio at the time our lease was executed, and thus became an integral part of the lease contract, we believe that *Muhlker vs. New York and Harlem Railroad Co.,* (1905) 197 U. S. 544, is strongly in point here. Paragraphs 2 and 3 of the syllabus are as follows:

> "The *Elevated Railroad* cases, decided by the Court of Appeals, established the law of the State of New York to be that the easement of light and air of abutting property owners in the streets of New York above the street to be property and within the protection of the Constitution for compensation in case of its diminution by an elevated railroad structure.
>
> "Such decisions assured to purchasers of property, abutting on streets the beds whereof had been deeded to the City of New York in trust for streets, that their easements of light and air were secured by contract and could not be taken from them without compensation; and the courts of that state cannot change or modify their decisions so as to take away rights which have been acquired by contract and are within the protection of the Federal Constitution."

We refer the Court to further discussion of this point and of the *Worthington* case at pp. 42 to 45 hereof.

2. The Judgment Is Based Upon Other Errors so Gross and Obvious as to Amount to Arbitrary and Capricious Action. This Is Shown by the Following:

(1) Errors of the Court as Shown by an Examination of Its Opinion

It is well settled that gross and obvious errors coming close to the boundary of arbitrary action constitutes a denial of due process. *Roberts, Receiver, vs. New York,* 295 U. S. 264; *Truax vs. Corrigan,* 257 U. S. 312; *Chicago Life Insurance Co. vs. Cherry,* 244 U. S. 25; *American Railway Express vs Kentucky,* 273 U. S. 269; *Pennoyer vs. Neff,* 95 U. S. 714; *Booth vs. Illinois,* 184 U. S. 425.

> "A finding without evidence is arbitrary and useless, * * *."
>
> *Interstate Commerce Commission vs. Louisville and Nashville Railroad Co.,* 227 U. S. 88.

As appears from the same case, this is likewise true if the finding is contrary to the "indisputable character of the evidence," (citing *Tang Tun vs. Edsell,* 223 U. S. 673, 681; *Chin Yoh vs. United States,* 208 U. S. 8, 13; *Loh Wah Suey vs. Backus,* 225 U. S. 460, 468; *Zakonaite vs. Wolf,* 226 U. S. 272); or if the facts found do not, as a matter of law, support the order made (citing *United States vs. B. & O. S. W. R. R.,* 226 U. S. 14; *Cf. Atlantic C. L. vs. North Carolina Corp. Com.,* 206 U. S. 1, 20; *Wisconsin, M. & P. R. Co. vs. Jacobson,* 179 U. S. 287, 301; *Oregon Railroad vs. Fairchild,* 224 U. S. 510; *I. C. C. vs. Illinois Central,* 215 U. S. 452, 470; *Southern Pacific Co. vs. Interstate Com. Comm.,* 219 U. S. 433; *Muser vs. Magone,* 155 U. S. 240, 247.

The Court of Appeals, as shown by its opinion, was flagrantly wrong in each of the following respects:

(a) In holding that by the stipulation of the parties

> "that the two arbitrators selected by the parties shall not be deemed disqualified on the ground of interest by reason of the fact that they respectively have been, or now are, representing the parties in real estate matters,"

and by the appointment of the two real estate brokers referred to, the parties

> "materially departed from and modified the scheme provided for in the lease"
>
> (Opinion, Appendix, p. 64),

whereas the stipulation was not a waiver of disinterestedness but obviously was and was intended to be a mere acknowledgment that the relationship of the parties to the appraisers appointed by them did not disqualify them as a matter of law and should not be a ground of challenge.

This holding, we submit, is the **key error** from which all the other errors stem. The matter quoted by the Court of Appeals is part of the last sentence in the second paragraph of the letter of June 1, 1939 (Pl's Ex. 3). The entire paragraph is as follows:

> "It is understood that the requirements of said lease that the three arbitrators shall be freeholders and residents of the City of Toledo have been waived by mutual consent of the parties only for the present arbitration. It is likewise understood for said purpose that the two arbitrators selected by the parties shall not be deemed disqualified on the ground of interest by reason of the fact that they respectively have been, or now are, representing the parties in real estate matters."

This letter was one of the four letters (Pl's Exs. 2, 3, 4 and 5) exchanged by the presidents of the parties at the time they selected the two arbitrators or appraisers. (These letters are set out at pages 65-67 of the record.) These letters constituted the entire transactions on the subject. There was no other understanding. All that was said or intended by the last sentence of this stipulation was that the mere fact that the arbitrators bore such relationship

to the parties was no disqualification in law, and that there should be no challenge on that ground. There was no waiver as to the requirement of disinterestedness. On the contrary, the wording shows a studious regard for that phase of the matter and a sharp determination to avoid such a waiver. Neither party has ever contended that, by this stipulation and the appointment of Messrs. Crosby and Reuben, the parties in any way departed from or modified the lease. That idea originated with the Court of Appeals.

Thus, the Court of Appeals made this whole case turn on the construction and, we respectfully submit, **the distortion of a single sentence.** It is perfectly obvious that if the parties had intended a waiver as to disinterestedness, they would not have gone to the trouble of using two sentences in the paragraph above quoted, but would undoubtedly have disposed of the whole matter in one sentence.

By the last sentence of Pl's Ex. 3, the parties recognize that the two arbitrators were not interested simply because of their relationships to the parties. The Court of Appeals determines this as meaning **quite the opposite,** namely, that the parties recognize that these two arbitrators are interested and that the parties are expecting them to act as partisans, as representatives, as agents and with full bias and prejudice.

Attention has already been called to the fact (see "Statement of Case") that neither of these arbitrators ever had anything to do with the property in question, and that their authority in other matters was extremely limited, and that neither of them had any known financial interest or other relationship to the parties which would disqualify them. Later in this brief (pp. 33 to 40) it will be shown that it is **settled law** that relationships, such as Messrs. Reuben and Crosby bore to the parties, are no disqualification as a matter of law; also that arbitrators or appraisers, **however their duty has been devolved upon them,** owe to

the parties complete impartiality, fairness and good faith, and that an arbitration or appraisal once entered upon must be conducted in absolute good faith.

It is evident from the opinion that the Court of Appeals sustained this unconscionable award in the face of the admitted facts—that there was no hearing, no joint session, no deliberative proceeding by the arbitrators, the third man acting as umpire—and condoned all the misrepresentations, fraud and chicanery of Mr. Reuben and respondent, because the court took the view that the requirements of the lease as to hearing, joint session and joint determination, and fair, unbiased action by the arbitrators had been wiped out through modification of its terms, so that Messrs. Crosby and Reuben became mere advocates of the parties instead of arbitrators, as the lease required.

(b) In assuming that the officers and attorneys of the parties had the inherent power and authority to bind the parties, both corporations, to a material departure from and modification of the provisions of the 99-year lease.

The Court of Appeals, in support of its position with respect to Pl's. Ex. 3, just discussed, calls attention to the joint application to the Common Pleas Judge for the appointment of the third arbitrator (Pl's Ex. 6, R. p. 139). This application was signed only by the attorneys for the parties. In that application was the recital:

> "The parties have duly waived any objection to said two arbitrators on the ground of interest, freeholding or place of residence."

This was a mere recital and inadvertently and loosely referred to in the letters above mentioned. (Pl's. Exs. 2, 3, 4 and 5.) It was not intended or understood to be anything more. The attorneys could not enlarge the stipulation which the presidents of the two corporations had made and they had no thought of doing so.

A 99-year lease is one of the most solemn instruments

known to the law. The lease involved in this case covered property of great value and the arbitration was to determine the amount of rent for a 10-year period. A modification of such an instrument under such circumstances cannot be lightly considered. It can be shown only in writing by express terms or "by such clear and concise evidence as to leave no reasonable doubt about it." *Northern Assurance Co. vs. Kehoe,* 24 C. C. N. S. 465; *Ashley vs. Henahan,* 56 Ohio St. 559; *Union Central Life Insurance Co. vs. Hook,* 62 Ohio St. 256. See also *Brown vs. Lyddy,* 11 Hun. 451 (*Supra*), where the court says:

> "The right of the parties to a hearing, and to produce witnesses, is one of the established privileges (*Elmendorf vs. Harris,* 23 Wend. 628), although it may be waived by them. The courts would not declare that such a right did not exist, unless the terms of the submission so provided, or a waiver, was clearly demonstrated. * * *." (P. 456.)

We submit that the letters (Pl's. Exs. 2, 3, 4 and 5) did not by their terms, and were not intended, to constitute a waiver as to disinterestedness of the two arbitrators.

In view of the position taken by the Court of Appeals, we are confronted with the question, by what authority was the lease modified? The record is silent as to any action of the Board of Directors of either petitioner or respondent. The charters of these corporations and their codes of regulations and by-laws are not in evidence. The record is silent as to any prior course of dealing.

The law with respect to the authority of officers and agents of a corporation is stated in *2 Fletcher Cyclopedia Corporations, Permanent Edition,* Section 434, page 228, as follows:

> "* * * The president, treasurer, secretary and other officers of a corporation are merely its agents, appointed by the stockholders or the board of directors or trustees, and vested with such powers, and such powers only, as may be conferred upon them by

> the corporation, subject, of course, to any express charter or statutory provisions. Their power to bind the corporation is determined by the extent of the authority expressly or impliedly conferred upon them by resolution of the stockholders or directors by the by-laws of the corporation, or otherwise, and by application of the general principles governing the relation of principal and agent. The general rule is that the officers and agents of a corporation, like the agents of a natural person, have such authority only as has been conferred upon them by their principal, the corporation; and contracts or acts in excess of their authority will not bind the corporation, in the absence of estoppel or ratification. All of the authorities agree that a corporation is not bound by the acts of its agents not within the scope of their authority. * * *"

See also *10 Ohio Jurisprudence,* Section 531, page 720; Section 548, page 744.

The law of Ohio has been laid down by the Supreme Court of Ohio to the effect that, in the absence of express authority conferred upon its officers and agents or of such a course of dealing with the other party as clearly implies authority, a corporation can be bound only by its board of directors.

The leading case in Ohio on this subject is *Bradford Belting Co. vs. Gibson,* 68 Ohio St. 442. That case dealt with a contract to erect a factory building on a lot in Cincinnati and after its completion to execute a 99-year lease of the property to defendant, in consideration of which the defendant agreed to accept the lease and to pay certain rental. Plaintiffs proceeded with the building work, and before the same was completed an officer of the defendant-corporation notified plaintiffs to stop the work and that his company would not enter into the lease. Plaintiffs did stop the work and brought suit and attempted to prove an anticipatory breach of the contract based upon the state-

ment of the officer of the defendant-corporation. The court held in the fourth syllabus as follows:

> "4. It is error to instruct the jury that if the secretary did make such statements that would be *prima facie* evidence that the directors had so decided, and the plaintiff would be authorized to consider that he had spoken by authority of the board of directors; and that if the jury should find that the secretary did make such statements, the burden of proof would be upon defendant to show that the secretary had acted without the authority of the board of directors."

The Bradford Belting Co. case was cited with approval in *Kroeger, Superintendent of Building and Loan Associations, et al. vs. Brody, Trustee,* 130 Ohio St. 559, in which the court quoted from the New Jersey case of *Myrtle Avenue Corp. vs. Mt. Prospect,* 112 N. J. L. 60, 169 A. 707:

> " 'A corporation is bound by the act of its president only to the extent that the power to do the act has been conferred upon him expressly by the charter, by-laws or corporate action of its stockholders or board of directors, or can be implied from the powers expressly conferred, or which are incidental thereto, or where the act is within the apparent powers which the corporation has caused those with whom the president has dealt to believe it has conferred upon him.' " (P. 564.)

The *Brody* case was cited with approval in *State ex rel. Squire, Superintendent of Banks, vs. Frasier et al.,* 133 Ohio St. 283.

In view of these holdings, there is no basis whatever for the view taken by the Court of Appeals that the lease was modified. Clearly, Messrs. Wilcox and Eppstein did not have the power and authority to throw over their shoulders the important requirements of the lease that the value should be determined by disinterested arbitrators in joint session and by deliberative process, after a full hearing before the arbitrators, which the lease contemplated. No

one, unless it was Mr. Price, even dreamed that he would assume the role of umpire.

(c) In holding that the stipulation of the parties and the selection of the two arbitrators constituted these men

> "their respective representatives on the board of appraisers"
>
> (Opinion, Appendix, p. 64),

whereas the law clearly is that arbitrators so appointed are not the respective representatives and agents of the parties appointing them, and that arbitrators, regardless of how their duties have been devolved upon them, owe both parties the duty of fairness, honesty and good faith.

(d) In holding that the stipulation and the selection of the two arbitrators

> "robbed the appraisal of the deliberate character the lease contemplated"
>
> (Opinion, Appendix, p. 64),

whereas the lease requires that the value shall be

> "determined and fixed * * * in joint session,"

which certainly calls for an intelligent inquiry, joint deliberation, free and full debate, and joint judgment.

(e) In holding that the stipulation and the selection of the two arbitrators

> "in effect, made the third man an umpire"
>
> (Opinion, Appendix, p. 64),

whereas the lease makes him a joint arbitrator and requires the valuation to be determined in joint session by majority vote.

(f) In holding that the two arbitrators appointed by the parties had power as representatives and agents of the respective parties, in conjunction with the third arbitrator, to deny the parties a hearing, and indeed to refuse the request of petitioner for a hearing, notwithstanding the rule declared by the Ohio Supreme Court that:

"When it is reasonably practicable, an opportunity should be given the parties to be heard by the appraisers, before making their valuation; otherwise it will not be binding upon the party deprived of such opportunity."

5th Syl., *Worthington vs. Hewes & McCann*, 19 Ohio St. 66.

(g) In holding that the parties were actually accorded a hearing in that

"The two interested appraisers representing their clients presented their respective evidence and arguments in their briefs."

(Opinion, Appendix, p. 65.)

This amazing holding is made in the face of the fact that neither arbitrator appointed by the parties had the slightest notion of, or opportunity of knowing what considerations or alleged facts or arguments the other was urging upon the third arbitrator, and in the face of the fact that what was intended by all the arbitrators as a mere preliminary procedure for the education of the third arbitrator was converted by the conduct of the third arbitrator and of the lessee-appointed arbitrator into a finality, foreclosing any discussion, debate, or deliberation in joint session.

(h) In disregarding the fact that the submission of the written statements to the third arbitrator was understood by all of the arbitrators, as shown by their undisputed testimony, to be only a preliminary step, and was not intended to dispense with or foreclose full discussions and joint debate later. The court's grave oversight in this respect is shown by its statement as follows:

"If this were to be a deliberative process, the representative appraisers should and would have exchanged copies of their briefs."

(Opinion, Appendix, p. 64.)

The fact is that the lessor-appointed arbitrator prepared and submitted his writing to the third arbitrator at once,

while the lessee-appointed arbitrator took about two weeks. Under the circumstances, the lessor-appointed arbitrator asked the third arbitrator to treat his writing as confidential for the time being. Neither writing was disclosed by the third arbitrator throughout the arbitration proceeding, because, as above indicated, the proceeding never reached the discussion stage. When the arbitrators met for what they supposed was to be a "joint session," the third arbitrator announced his decision as to value; the lessor-appointed arbitrator began to protest; the lessee-appointed arbitrator interposed, saying, "We are not here to argue the matter," and that he would meet the figure stated.

(i) In holding that the proceedings of the arbitrators

> "met the requirements of the lease as expressly modified by the parties, * * *."
>
> (Opinion, Appendix, p. 65);

whereas, there was no modification of the lease; no one had authority to modify it, or the slightest intention of doing so. If petitioner had any thought that the lease was modified and a hearing waived, why would its counsel expressly ask for a hearing or notify Mr. Price of its readiness to appear at the convenience of the arbitrators?

(j) In lightly absolving respondent, its officers, its counsel, and the arbitrator appointed by respondent, from the very serious charges contained in the second amended petition, though they stand convicted on the record by the undisputed evidence, and indeed, by their own admissions. The Court of Appeals excuses the most reprehensible and successful efforts to tamper with and improperly influence the arbitration and the most shocking falsehoods and distortions of fact, with the light statement that,

> "each representative appraiser was only 'putting his (or his client's) best foot forward.' "
>
> (Opinion, Appendix, p. 65.)

Thus did the court put its seal of approval on conduct abhorrent to equity and good morals.

The action of the Court of Appeals in giving its sanction to and in upholding the unconscionable award made without a hearing being accorded petitioner, is a denial of due process, and the other errors of the Court of Appeals are so flagrant as to be arbitrary and capricious exercise of power, in clear conflict with due process.

2. **The Court Refused to Make Findings of Fact, Including the Material Probative Facts Requested Pursuant to Section 12223-30, General Code of Ohio**

Section 12223-30 of the Ohio General Code is as follows:

> "**Court shall state on record facts upon which error arises.** On application of a party objecting to a ruling or decision of the Court of Appeals during the trial, or on motion for a new trial, such court shall find from the evidence and state on the record the facts upon which the alleged error arises, or which may be material in determining whether or not error has intervened."

It will be noted that Section 12223-30 requires the court to find not only "the facts upon which the alleged error arises," but also the facts "which may be material in determining whether or not error has intervened."

If the court may satisfy the requirements of this statute merely by a series of general findings of ultimate facts, as was done in this case, then the request of petitioner was an idle gesture and the statute is a dead letter. The spirit and purpose of the statutory provisions is to require the court to find all the material facts to enable the reviewing court to determine whether or not the decision is erroneous.

We refer the Court to the findings of fact prepared and submitted by petitioner, pursuant to the statute and Rule

IX, at pages 60-106 of the record, and to the interrogatories at pages 47-60 of the record, and ask the Court to compare the same with the so-called findings adopted by the Court of Appeals at pages 107-117 of the record.

The Supreme Court of Ohio has not had occasion to interpret Section 12223-30 with respect to the point under discussion; but it has had occasion to interpret a kindred statute relating to trials in the Common Pleas Courts of Ohio. The kindred statute referred to is Section 11421-2, General Code of Ohio, which is as follows:

> "**Findings when case tried by court.** When questions of fact are tried by the court, its findings may be general for the plaintiff or defendant, unless, with a view of excepting to the court's decision upon questions of law involved in the trial, one of the parties so requests, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law."

In *Cleveland Produce Co. vs. Dennert*, 104 Ohio St. 149, the Supreme Court of Ohio held that the provisions of Section 11421-2, General Code, (then Section 11470) confer a substantial right and are mandatory; and that where questions of fact are tried by the court, the refusal of a request for special findings and the refusal to answer interrogatories involving probative facts is reversible error. The syllabus of that case is as follows:

> "The provisions of Section 11470, General Code, confer a substantial right and are mandatory, and where questions of fact are tried by the court without the intervention of a jury, and one of the parties with a view of excepting to the court's decision upon questions of law involved in the trial requests a separate written statement of the conclusions of fact, and as an aid to the court submits special written interrogatories for such purpose, it is the duty of the court as a part of its judgment to make answer to all interrogatories involving the ultimate facts of the controversy, and to all involving probative facts

from which the ultimate facts can be inferred as a matter of law and its failure to do so is reversible error."

The *Dennert* case was followed in the case of *Levict et al., Appellant, vs. Bonnell, Appellee,* 137 Ohio St., 453. See also *Oxford Township vs. Columbia,* 38 Ohio St. 87; *Cleveland & Toledo Railroad Co. vs. Johnson & Kellogg,* 10 Ohio St. 591.

As above noted, the *Dennert* case dealt with a trial in the Common Pleas Court while the *Levick* case dealt with a trial in the Municipal Court; yet, where the Court of Appeals is the trier of the facts, as in this case, the reasoning of the *Dennert* case is equally applicable and the court was required not only to find the material probative facts but also to answer interrogatories. We submit that that is the purpose and intent of Section 12223-30, which is a part of the Appellate Procedure Act of Ohio.

3. **The Court Made General Findings of Fact Mixed with Conclusions of Law, Unsupported by Any Evidence and Contrary to the Undisputed Evidence**

The Court's attention is called to fundamental matters as to which the findings of the Court of Appeals are not supported by any evidence or are contrary to the admitted or undisputed evidence:

In finding No. 15 (R. p. 116) the Court of Appeals found "that the parties did have a hearing." There is no evidence whatever to support this finding.

In finding No. 12 (R. p. 116) the Court of Appeals found that "the appraisers did in joint session by a majority vote determine and fix the fair market value * * *." **The undisputed evidence is to the contrary.** There was no joint session. There was never any discussion, debate or joint deliberation concerning the

factors affecting value, as the lease expressly required.

In finding No. 10 (R. p. 115) the Court of Appeals found that "on June 27, 1939, the appraisers thus appointed met and discussed the fair market value of said land exclusive of buildings and improvements and the method or procedure to be followed by them in the appraisal of said land." **The undisputed evidence is directly to the contrary.** All three appraisers, who were the only persons present at said meeting of June 27, 1939, testified that there was no discussion of the fair market value of the land at that meeting. There was no such discussion at the other meeting held by them on July 18, 1939.

In finding No. 6 (R. p. 115) the Court of Appeals found "* * * the parties agreed to waive and did waive so far as these two appraisers were concerned, the requirements of the lease that the appraisers be disinterested freeholders * * *."

As to this finding, we respectfully refer the court to the discussion under (a) commencing at page 19 of this brief. It is equally applicable here and need not be repeated.

In finding No. 18 (R. p. 117) the Court of Appeals found "that the appraisal as made is in accordance with the lease as modified, changed and interpreted by the parties."

As to this finding, we respectfully refer the court to the discussion under (b) commencing at page 22 of this brief. It is equally applicable here and need not be repeated.

The finding and decision of the Court of Appeals amounts to a ruling that the parties modified this 99-year lease by inadvertence and contrary to any express or implied authority on the part of the officers who acted for the corporations.

By its finding No. 15 (R. p. 116) the Court of Appeals found "that the appraisal was made fairly and was free from fraud, conspiracy, misrepresentations or irregularities."

These general findings are in the face of the undisputed testimony and matters of record showing the glaring falsehoods, misrepresentations and concealments contained in the written statement prepared by Mr. Sanger and palmed off on the third arbitrator, Mr. Price, by Mr. Reuben (Exhibit No. 11).

4. The Court Ignored the Settled Rule that an Arbitrator Is Not the Agent of the Party Appointing Him and that He Owes the Parties Impartiality, Honesty and Good Faith

In a desperate effort to escape the damaging case against them, respondent's counsel were forced in the courts below to resort to false and artificial arguments. They kept insisting that in arbitrations and appraisals generally the person appointed by each party is, and is intended to be, his agent and representative. Unfortunately the Court of Appeals was misled. The court not only adopted this view, but also went so far as to hold that the lease was modified, the joint session and deliberative process required was eliminated, a hearing was waived and Mr. Price became the umpire.

Neither the facts nor the law support these views. Indeed, if the position taken by the court were sound, then a valid award could have been made by Mr. Price alone, and the concurrence of Mr. Reuben in the award was unnecessary. In the view of the court, Messrs. Crosby and Reuben never were arbitrators, but were merely the representatives and advocates of the parties who appointed them.

The court even condoned the fraud and misrepresentation practiced by Mr. Reuben and respondent, on the theory that Mr. Reuben, as agent of respondent, was merely "putting his (or his client's) best foot forward." We respectfully contend that the position is wholly false.

The 9th syllabus in *Sholz vs. Mills,* 176 Mo. App. 352, is as follows:

> "9. The fact that an appraiser appointed under a lease to appraise land for the purpose of fixing the rent mistakenly thought that he represented the party to the lease at whose instance he was appointed when it was his duty to act impartially, irrespective of the interest of any party, was ground for setting aside the appraisement."

In *3 American Jurisprudence,* pages 915-916, we read as follows:

> "§84. The authority of arbitrators differs from that of agents. On occasion, it is true, they have been regarded as agents of the parties, in the sense that their authority to determine the disputed matters is derived from the parties, at common law is subject to revocation at any time prior to the award, and, if exceeded, may nevertheless be confirmed by subsequent ratification of the parties. This view has been justly criticized on the grounds that their position, once they are appointed, is judicial in nature, that they are not subject to the direction and control of either party or to the general rules with respect to agents, and that the right to revoke their authority may be justified by reasons of public policy."

Note 5 of the text just quoted from *American Jurisprudence* refers to many cases, and quotes the following from one of them:

> " 'Arbitrators are, in no proper sense of the term, agents. * * * To call an arbitrator an agent is an egregious misnomer, and any attempt to apply to arbitration the rules pertaining to agency is farfetched and impractical.' (*Martin vs. Vansant,* 99

Wash. 106, 168 P. 990, Ann. Cas. 1918D, 1147.) They are not agents in law and ought not to be in practice. If they were subject to the direction of the parties, the whole proceeding would be a useless ceremony, for if the parties cannot agree by direct negotiation—and the arbitration clause is operative only in case of disagreement—they cannot agree through agents subject to their direction. (*Norwich Union F. Ins. Soc. vs. Cohn* (C. C. A. 10th) 68 F. (2d) 42, 94 A. L. R. 494, writ of *certiorari* denied in 291 U. S. 665, 78 L. Ed. 1056, 54 S. Ct. 440.)" (P. 916.)

See also *14 R. C. L.*, p. 1360.

Good faith and honest conduct go to the heart of every arbitration or appraisal.

In the case of *Insurance Company vs. Carnahan*, 63 O. S. 268, the Supreme Court of Ohio says, at page 273:

"* * * Good faith is required of both parties in the conduct of arbitration or appraisement when once entered upon; * * *."

In *Produce Refrigerating Co. vs. Norwich Union Fire Insurance Society et al.*, 91 Minn. 210 (1904), the court, at pages 213-214, speaks as follows:

"* * * The board of arbitrators is a *quasi* court, governed by rules applicable to common law arbitration, and should constitute a body of disinterested men, whose business it is to proceed in a judicial and impartial manner to ascertain the facts in controversy, **without regard to the manner in which the duty has been devolved upon them.** *Levine vs. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855; *Christianson vs. Norwich Union Fire Ins. Soc.*, 84 Minn. 526, 88 N. W. 16. **Arbitrators not avowedly selected as partisians, are, indeed, bound, as in the execution of a joint trust, to look impartially** at the true merits of the matter submitted to their judgment. *Morville vs. American*, 123 Mass. 129. An arbtiration is a judicial proceeding, and the arbitrators, being alike the agents of both parties, and not of one party alone, are bound to exercise a high degree of judicial

> impartiality, **without the slightest regard to the manner in which the duty has been devolved upon them.** *Grosvenor vs. Flint,* 20 R. I. 21, 37 Atl. 304.
>
> "But while neither natural nor legal disabilities hinder a person from being an arbitrator, provided the fact is known to the parties at the time of the submission, still, as he is the agent of both parties alike, and impartiality is the fundamental requisite, the **court closely scrutinizes the action of an arbitrator whose relation to one of the parties was such as to naturally influence the judgment even of an honest man.** *Sweet vs. Morrison,* 116 N. Y. 19, 22 N. E. 276. * * *"

It will be noted that, while the notion of agency appears in the *Rhode Island* case and in the *New York* case referred to in the foregoing quotation, the effect of agency is entirely eliminated by reason of the fact that the arbitrators are treated as the "agents of both parties, and not of one party alone." It will be seen also that the arbitrators are bound to exercise a high degree of impartiality, **"without the slightest regard to the manner in which the duty has been devolved upon them."**

In view of the wholly false contentions of opposing counsel and of the resulting grave error of the Court of Appeals with respect to the so-called waiver as to disinterestedness of the appraisers, we think this Court will find it very helpful to note the Annotation in *104 A. L. R.,* commencing at page 563. While the Annotation deals with insurance appraisers, the principle is equally applicable here. It there appears that the **mere fact that one appointed by the insurer as an appraiser or arbitrator to determine the amount of the loss under an insurance policy on property has acted in a similar capacity on other occasions for the insurer, or that a person selected by the insured as appraiser has previously thereto, at the instance of the insured, made a computation of the loss, does not, as a matter of law, disqualify such appraiser.** The following are ex-

amples of cases to which the Annotation refers in this connection:

"In *Levin vs. Northwestern Nat. Ins. Co.,* (1911; C. C.) 185 F. 981, it was held that the arbitrator appointed by the insurer was not disqualified because he had previously been selected by insurers, and in some instances by the defendant company, to act in similar cases, **there being no evidence to impugn his honesty or integrity,** or to show that he acted improperly in making the award or had any interest in the result; and it appearing that he was a contractor of large experience, well acquainted with the cost of the building and building materials, and that he had acted as appraiser for the insured in some cases, as well as for the insurer in others. The court stated that **the fact that he had previously acted as an appraiser spoke for his competency to act in such capacity, rather than against it.**" (P. 564.)

"In *Northern Assur. Co. vs. Melinsky,* (1927) 237 Mich. 665, 213 N. W. 70, it was held that the fact that one had acted as appraiser for the plaintiff insurance company and other insurers at the request of plaintiff's adjuster did not render him ineligible subsequently to act as an appraiser for the plaintiff insurance company.

"That appraisers chosen have frequently acted in other insurance disputes is no disqualification, nor evidence of bias or prejudice. *McQuaid Market House Co. vs. Home Ins. Co.,* (1920) 147 Minn. 254, 180 N. W. 97.

"To disqualify, there must be shown some act or acts of misconduct prejudicial to the interests of the party complaining. *Ibid.*" (P. 564.)

"In *American Cent. Ins. Co. vs. Terry,* (1927; Tex. Civ. App.) 298 S. W. 658, where the suggestion was made by insured that the appraiser for the insurance company was not an impartial and nonpartisan person, suitable for selection in the first instance, in that he had been selected by the company as its appraiser many times before and in the cases had consistently served with partiality and bias in making awards of amount of damage, the court observed that, even if true, this fact alone **would not necessarily or properly be inconsistent with his im-**

partiality in the present case, in the absence of some act or conduct tending to exhibit his serving the company's interest as a partisan would." (P. 565.)

"In *Christianson vs. Norwich Union F. Ins. Soc.*, (1901) 84 Minn. 526, 88 N. W. 16, 87 Am. St. Rep. 379, it was held that a person did not assume the consequences of irregularities and misconduct on the part of a referee merely because it was known to the former that the appraiser was a professional referee on behalf of the interests of the opposite party." (P. 566.)

In the same Annotation, page 566, under the heading "Prior service of appraiser as evidence of interest or bias," we read the following:

"In the cases already considered, the courts, while taking the view that prior service by the appraiser would not disqualify him as matter of law, may be regarded as, in general, not opposed to the proposition that such evidence may be considered in passing on the question of bias or interest. See in this connection particularly *Cohen vs. Atlas Assur. Co.*, (1914) 163 App. Div. 381, 148 N. Y. S. 563, and *McQuaid Market House Co. vs. Home Ins. Co.*, (1920) 147 Minn. 254, 180 N. W. 97, *supra.*"

In the same Annotation, page 567, under the heading "Previous service together with other circumstances held to disqualify; amount or nature of such service," there is an interesting collection of cases. The following is quoted from page 570 as an example:

"The fact that the company insured, which sought to have an award of appraisers set aside on the ground that one of the appraisers was disqualified because he was not disinterested but was biased in favor of the insurance company appointing him, knew that the appraiser so appointed had often served in that capacity for the insurer, would not preclude the insured from having the award set aside, where there was nothing to indicate that the insured had any reason to suspect that such appraiser's experience would cause him to be other-

> **wise than just and fair in his decision,** and in addition, the representatives of the insured were assured by persistent and positive statements by the insurer that the appraiser was a conscientious and just person in the settlement of such disputes, and, the experience of insured with him being limited, it was justified in accepting the assertion as true. *Ibid.*" (*Produce Refrigerating Co. vs. Norwich Union F. Ins. Co.*, (1904) 91 Minn. 217, 97 N. W. 875, 98 N. W. 100 (affirmed on reargument in (1904) 91 Minn. 210, 98 N. W. 100).)

At page 571 of the Annotation, there is the heading "Where both insurer and insured have friendly appraisers." We quote from what is said with reference to *Remington Paper Co. vs. London Assur. Corp.*:

> "And in *Remington Paper Co. vs. London Assur. Corp.*, (1896) 12 App. Div. 218, 43 N. Y. S. 431, it was held that the fact that an arbitrator designated by the insurance company had been frequently employed by such company and other insurance companies to appraise losses occasioned by fires would not, in and of itself, show partiality so as to justify setting aside the award of the arbitrators, particularly in view of the fact that the arbitrator appointed by the insured was concededly friendly to, and was at the time of the appraisal, in the employment of insured, **and both arbitrators acted competently and fairly and agreed on the appraisal,** so that the services of the umpire were not needed or called for." (Pp. 571-572.)

In closing the discussion under this head, we call attention to the fact that, even in cases where by the terms of the contract questions relating to its execution are left to the decision of an agent or employee of one of the parties, the law strictly insists on impartiality, honesty and good faith. This is illustrated by the host of cases involving building or construction contracts, where the decision is left to an architect, engineer or superintendent employed by one of the parties. Cases of this type are dealt with in

Annotations appearing in *54 A. L. R.* 1255, and *110 A. L. R.* 137. On page 143 of the latter Annotation, we read:

> "As stated in the earlier annotation, notwithstanding a contract makes the certificate, report, opinion, or decision of an engineer or architect conclusive on the parties, the law writes into this provision that the conduct of the arbiter must be free from fraud. Fraud on his part destroys the effect of the provision. Therefore, if the architect or engineer fails honestly to exercise his judgment, or makes such gross mistakes as to imply bad faith, his decision, report, certificate, or opinion is not binding on the parties to the contract. * * *"

Mr. Reuben was no more relieved of his obligation to act fairly and impartially than would be a judge who was called upon to hear a case involving a former client under similar circumstances. The situation is comparable to that where a litigant waives a challenge for cause and accepts as a juror a person who has been identified with the adverse party in some similar capacity. Such juror would not thereby be relieved of the duty to act honestly, fairly and impartially. The claim of agency is without foundation in law or in morals. Under no ethical or legal concept were Mr. Reuben or respondent excused from the exercise of the simple rules of **honesty and good faith** toward both Mr. Price and petitioner.

II. THE AWARD IS ILLEGAL AND VOID

1. Grounds for Vacating Award

By way of preface to this discussion, we quote the following from *3 American Jurisprudence*:

> §139. "Since a party to an arbitration proceeding has a right to the judgment of disinterested and honest men, it is the rule that collusion between an arbitrator and the party benefited is ground for impeachment of an award. * * *" (P. 962.)
>
> §140. " * * * The general rule is that an award may be impeached for fraud, improper conduct, or

unfair means employed by the successful party in procuring it. * * * in such cases the award will be set aside on proof of the improper conduct, irrespective of whether or not the arbitrators were actually influenced thereby in making the award. * * * "
(Pp. 962-963.)

§142. "* * *

"Gross inadequacy or exorbitance in an award has been considered to indicate either fraud, or such neglect and carelessness as to constitute misconduct on the part of the arbitrators. * * *" (Pp. 964 965.)

The following is quoted from *Pomeroy's Equity Jurisprudence,* 5th Edition, 1941, Vol. 3, page 610:

" * * * Proper grounds for avoiding an award include fraudulent concealment of material matters, positive evidence of fraud or collusion on the part of the arbitrators, and the secret or private communication by one of the parties with the arbitrators, where the communication was with an apparent intent to gain an unfair advantage. * * * "

The following is quoted from *Ice Service Company vs. Phipps' Estate,* 245 N. Y. 393, 157 N. E. 506 (1927):

"* * * The parties have made the appraisers the judges—the court of last resort—**unless they have mistaken their authority, departed from the submismission, clearly misconceived their duties, acted upon some fundamental and apparent mistake or have been moved by fraud or bias.**"

2. Nature of Submission to Arbitrators

Throughout the lease the proceeding of the appointees is called an "arbitration" and the appointees are uniformly called "arbitrator" or "arbitrators." We shall use these words for the most part in the same way.

The proceeding is an appraisal, but one "akin to an arbitration" as was said in *Van Cortlandt vs. Underhill,* 17 Johnson (N. Y.) 405, and "in the nature of an arbitration,"

as was said in *Janney, S. & Co., vs. Goehringer* (1893), 52 Minn. 528, 54 N. W. 481, and was "of that importance and so liable to possible abuse, fraud or mistake that the parties to be affected thereby should have an opportunity to be heard." *Worthington vs. Hewes & McCann* (1869), 19 Ohio St. 66.

3. A Hearing of the Parties before the Arbitrators Was Required by Law

In *Worthington vs. Hewes & McCann, supra,* there was involved a certain lot of land subject to a 99-year lease. The lease contained a covenant providing that, at the end of the first fifteen years, the value of "said lot of ground, without reference to the buildings and other improvements * * *, should be appraised and valued by three intelligent and disinterested men, * * *". Suit was brought by the plaintiff (the owner) on the award. Defendants demurred to the petition, one of the grounds being that they should have had an opportunity to be heard by the appraisers before the award was made. In the syllabus it is said:

> "* * *
>
> "5. When it is reasonably practicable, an opportunity should be given the parties to be heard by the appraisers, before making their valuation; otherwise it will not be binding upon the party deprived of such opportunity."

At pages 77-78 of its opinion, the court said:

> "IV. * * * **In view of the importance of the interests to be affected, and the length of time for which the appraisement is to last, it seems to us it ought not to be made in the absence of the parties, and without consulting them, where it is reasonably practicable to give them a hearing. In so holding it is unnecessary to say whether the proceeding is to be regarded as an arbitration or not.** It is surely not in the nature of an arbitration, so far as regards any

> supposed right of the parties or privies, to revoke the authority of the appraisers. **But we think it is a proceeding of that importance, and so liable to possible abuse, fraud, or mistake, that the parties to be affected thereby should have an opportunity to be heard. That such opportunity was afforded to the defendants in the present case, does not appear by the plaintiff's petition, and the demurrer thereto was, therefore, properly sustained.''**

It will be noted that this court does not find it necessary to determine whether the proceeding is an appraisal or an arbitration. A proceeding of this kind is of the **importance** of a strict arbitration.

The *Worthington* case has never been overruled or in any way qualified in later decisions of the Supreme Court of Ohio.

The *Worthington* case is not unique. See, for example, *Janney S. & Co., vs. Goehringer, supra*, where the 1st syllabus is as follows:

> ''1. A lease of real estate for a term of years provided that upon its termination the lessors should purchase from the lessees, at the fair market value, the buildings which the latter might have erected, and that the value should be conclusively determined by three appraisers, for the selection of whom, in the usual way, the lease provided. It being necessary for the appraisers to construe the contract for the purpose of determining the basis upon which the value was to be estimated, **held**, that an appraisal made without opportunity afforded to the parties to be heard was invalid.''

In the opinion of the court it is said:

> ''* * * In such a case the parties had the same right to be heard before their cause was adjudged as they would have in any general arbitration.'' (P. 482.)

It is apparent that in our case many troublesome considerations would at once confront the arbitrators or appraisers. For example: Is the ground to be valued as encumbered by the lease, which is extremely favorable to lessee? Is the fair market value to be determined as in case of sale, or for the purpose of the lease? Is it proper to consider the value of the ground to the lessee, or must the value be determined generally?

In view of the language of our lease, "to determine and fix the fair market value" and "in joint session," we think the following case from New York is extremely helpful:

In *Brown vs. Lyddy* (New York, 1877), 11 Hun. 451, a lease containing a privilege of renewal provided that, if the parties were unable to agree upon the rent, an arbitrator should be chosen by each party, the two to "ascertain" the value of the lot, and allow five per cent thereon as rent; and if they were unable to agree, that they should choose an umpire, whose decision should be final. The following is taken from the opinion of the court:

> "* * * The appraisers, as we have seen, were to ascertain the value, but in what manner is not stated, whether by the exercise of their own knowledge and judgment or by a hearing at which the parties could produce witnesses. The word **'ascertain,'** however, has its meaning, and therefore, its force, to make sure or certain; to fix; to establish; to **determine**; to settle are the definitions of that word, according to Worcester, and this would seem to demand the observance of the usual mode of investigation in order to establish, **to determine,** to settle the value. The right of the parties to a hearing, and to produce witnesses, is one of the established privileges (*Elmendorf vs. Harris,* 23 Wend. 628), although it may be waived by them. The courts would not declare that such a right did not exist, unless the terms of the submission so provided, or a waiver, **was clearly demonstrated.** * * *" (P. 456.)

In the courts below opposing counsel endeavored to make it appear that the *Worthington* case has been overruled by *Royal Insurance Co. vs. Ries,* 80 Ohio St. 272, 88 N. E. 638 (1909). That case had to do with appraisal of fire loss of personal property, the loss amounting to approximately $1,000.00, pursuant to the terms of the standard insurance policy. The key words of the policy call upon the appraisers "to estimate and appraise the loss." The *Ries* case does not purport to discuss or affect the doctrine of the *Worthington* case; indeed, that case is not even mentioned.

We respectfully submit that the *Ries* case has not the slightest bearing on the situation we have here. Two entirely different types of contract are presented; the subject matter is entirely different. Under insurance policies, there is provision for an umpire in case the two appraisers appointed by the parties are unable to agree as to loss, and the umpire deals only with items as to which the appraisers are unable to agree. Frequently the losses involved under such policies are extremely small; whereas, in the instant case and in many cases like it, large amounts are often involved and important rights of the parties affected for many years.

In the instant case, the lease does not speak of "appraisers" who are to "estimate and appraise the loss," as in the standard fire insurance policy; it speaks of "arbitration" and of "arbitrators" who shall "in joint session, by a majority vote, determine and fix the fair market value of the real estate." This language by itself, particularly in view of the subject matter and the importance of the rights to be affected, would seem clearly to call for an intelligent inquiry, a hearing. Moreover, the *Worthington* case, calling for a hearing in a case of this kind, was an integral part of the contract of lease.

4. The Arbitrators Ignored Petitioner's Request for a Hearing

This has significance; it introduces an additional element. Even in insurance appraisal cases, the courts regard this as a matter of importance.

It will be sufficient in this connection to cite one case—*Aetna Insurance Co. vs. Jester,* 37 Okla. 413; 132 Pac. 130. That case has to do with an appraisal under a fire insurance policy. There the court says:

> "It is true that there are cases which hold that it is not necessary for the appraisers to hear parties, **but no case has been found where the appraisal was upheld when the appraisers had refused to hear the parties, or one of them.** * * *"

5. Respondent Was Given an Ex Parte Hearing before the Arbitrators

In the case of *Van Cortlandt vs. Underhill,* 17 Johnson (N. Y.) 405, there was involved a lease which provided for the appraisement of certain mill properties at the termination of the lease. The court found that the lease contemplated **something akin to an arbitration.** The opinion of one of the judges includes the following:

> "It is further alleged, that this award ought to be set aside for the misbehavior or misconduct of the arbitrators: 1st **in holding a private and** *ex parte* **meeting or communication with one of the parties, on the subject before them**; and 2nd for refusing to hear evidence material to the inquiry, with regard to the same subject, offered by one of the parties.
>
> "There can be no doubt, if either of these charges is substantiated, that it must prove fatal to the award. * * *" (Pp. 417-418.)

See, also *Elmendorf vs. Harris,* (N. Y. 1840), 23 Wendell, 627:

> "* * * If I am correct as to this principle, it neces-

sarily follows that where the arbitrator proceeds entirely *ex parte*, without giving the party against whom the award is made, any notice of the proceedings on the submission, the award is without authority and void.

"The only case I have been able to find in our own reports upon this point, is *Peters vs. Newkirk*, 6 Cowen 103, referred to in the opinion of the late Chief Justice Savage in the present case. There the Supreme Court of this state distinctly decided, that an appraisement which was to control the rights of parties, in the nature of an award, was a nullity, the appraisement having been made by the arbitrator to whom the parties had agreed to submit the question, on the *ex parte* application of one party only, and without any notice whatever to the other party, who was not present. In *Lutz vs. Linthicum*, 8 Peters' R. 178, Mr. Justice Story, in reference to such a proceeding, says that without question due notice should be given to the parties of the time and place of hearing; and if the award was made without such notice it ought, upon the plainest principles of justice, to be set aside." (Pp. 632-633.)

The so-called Reuben brief, besides affording respondent an *ex parte* hearing, also operated as an *ex parte* communication from the respondent through Mr. Reuben to Mr. Price. This practice is universally condemned.

"* * * Likewise, the award will usually be set aside where it appears that one of the parties communicated with the arbitrators privately."

3 American Jurisprudence, 963.

The note to this text cites the *Michigan* case, to be referred to in a moment, and also the Annotations appearing in *8 A. L. R.* 1088, and *11 L. R. A.* 626.

In the note to the text on the same subject in *Pomeroy's Equity Jurisprudence*, 5th Edition, Vol. 3, page 610 (*supra*), the following cases are cited:

Catlett vs. Dougherty, 114 Ill. 569 (1885);

Hewitt vs. Reed City, 124 Mich. 6, 50 L. R. A. 128 (1900);

Jenkins vs. Liston, 13 Grattan's Reports 535 (Va. 1856);

Sisk vs. Garey, 27 Md. Rep. 401 (1867).

In the case of *Catlett vs. Dougherty,* 114 Ill. 569 (1885), it is said in the syllabus:

> "1. It is sufficient to authorize a court of equity to enjoin a suit at law upon an award, and set aside the ward, that one of the parties in interest made a statement to one of the arbitrators, in the absence of the adverse party, **designed and having a tendency to improperly affect his decision as an arbitrator, without showing that such statement, in fact, produced any harmful result to such other party.**"

In the case of *Hewitt vs. Reed City,* 124 Mich. 6, 50 L. R. A. 128 (1900), the court says:

> "* * * The rule is very strict in excluding any communication to an arbitrator, made *ex parte* after the case is submitted; and when such communication, which may affect the result, is made, it is not usual to enter into an inquiry as to whether the arbitrator was in fact influenced by it or not. * * * It is contended that this rule should not be applied to the present case, as all that occurred was a mere citation of authorities; but it is to be kept in mind that the arbitrator is judge of the law as well as of the facts, and in this case the parties expressly agreed that neither was to be represented by counsel, thereby stipulating to exclude all legal arguments or briefs. It cannot be denied that the purpose of any citation must have been to influence the mind of the arbitrator on a question of law. * * *"
>
> (*50 L. R. A.*, pp. 128-129.)

In the case of *Jenkins vs. Liston,* 13 Grattan's Reports 535 (Va., 1856), at page 539, the court says:

> "It may therefore be safely declared that an award

> cannot be sustained if made in favor of a party who has secretly offered evidence which has been received by the arbitrators whilst acting in their capacity as such. Nor will the case be withdrawn from the operation of the general rule by proof that the award would have been the same without such proof. The law in its jealousy will not permit an enquiry into the effect of the evidence so received; it tends to partiality and corruption, and nothing less than the complete vacation of the award will satisfy the law."

In the case of *Sisk vs. Garey,* 27 Md. Rep. 401 (1867), paragraph 4 of the syllabus is as follows:

> "Where certain matters were submitted to arbitration, and the parties appeared before the arbitrators, and each filed a statement setting forth his charges, demands and claims against the other, and after the hearing was closed, the arbitrators received a statement from one of the parties, containing new and different items of claim from any presented at the hearing, and without the knowledge of the other party, a court of equity will enjoin a suit at law upon the award, and set it aside."

6. Mr. Price Acted as Umpire, Not as Third Arbitrator as Required by Lease

The lease in the instant case called for the joint deliberations and joint judgment of the arbitrators, after hearing and full debate. Mr. Crosby and Mr. Reuben, under the terms of the lease, had no power, until the third arbitrator was appointed, to do anything except to agree, or to attempt to agree, on the third arbitrator. This they were unable to do, and the Common Pleas Judge, under the terms of the lease, appointed Mr. Price. Mr. Price quite obviously thought that it was his function to resolve the differences between Mr. Crosby and Mr. Reuben, instead of entering into a joint debate with them on the subject of the valuation. He thought he was the umpire. Accordingly, after

receiving the written statements of Messrs. Crosby and Reuben, he proceeded to decide the matter—he did decide it. (R. pp. 676, 677.) The $950,000.00 value fixed by Mr. Price does not, of course, represent Mr. Crosby's judgment; it does not represent Mr. Reuben's claimed judgment; it does not even represent Mr. Price's judgment—he thought it a little high himself. (R. pp. 677, 743, 745.) What Mr. Price did was to decide the matter, in a false atmosphere and without light, without cross examination and without debate—a compromise decision, by which petitioner alone was compromised.

In the case of *Hughes vs. National Fuel Co.*, (Supreme Court of West Virginia, June 20, 1939), 3 S. E. (2d) 621, it is said:

> "* * * Where a controversy is submitted to arbitrators (provision not made for an umpire) the award must be concurred in by all or a majority of the arbitrators, depending on the express or implied terms of the agreement to arbitrate. Morse on Arbitration and Award, pp. 162, 163. An umpire is one clothed with authority to act alone in rendering a decision where the arbitrators have disagreed. 3 Am. Jur., p. 913." (P. 626.)

> "§82.—Umpire and Additional Arbitrator Distinguished.—A clear distinction exists between an umpire and an additional arbitrator. The former has power to settle the dispute by his sole award; the latter does not, but acts only in conjunction with the other arbitrators. * * * Where the agreement provides for an even number of arbitrators with power to select another person to pass upon the issues, and also contains a provision that in event of disagreement an award by a majority of the arbitrators shall be final, a person so selected is an **additional arbitrator, and not an umpire**, for it is plain that he is to act with the arbitrators first appointed."

3 American Jurisprudence, 914.

7. The Award Is Grossly and Palpably Inadequate

The value of the property determined by the Common Pleas Court was $1,500,000.00 (R. p. 30), which is $550,000.00 in excess of the award. (Pl's Ex. 9, R. p. 150.) The Court of Appeals did not consider the second cause of action, and, therefore, did not review the evidence in the record as to the value of the property. It merely said that an inadequacy of such a staggering amount did not in and of itself indicate fraud or irregularity. (R. p. 116; Opinion, Appendix, pp. 65-66.) We say that such an inadequacy is shocking to the conscience, and, when stated to a man of common sense informed as to the facts, would "produce an exclamation at the inequality of it." Coupled with the "inequitable incidents" disclosed by the record, the inadequacy clearly and unmistakably shows that the award was the result of mistake, fraud, bias or prejudice.

The law as to inadequacy is well set forth and applied in the case of *Sholz vs. Mills*, 176 Mo. App. 352, 158 S. W. 696 (1913). The tenth syllabus is as follows:

> "10. An appraisement of land, as for the purpose of fixing the rent, may be so palpably excessive or inadequate as to show that it was not the honest judgment of the appraisers, and, even though the excess or inadequacy is not so marked, it may be considered in connection with other circumstances showing ground to set aside the award."

In its opinion at page 378 the court says:

> "In the case before us it is not the mere inadequacy of the appraisement (although it is manifestly so low as to strongly appeal to the conscience of the court) nor a mere error of judgment on the part of the appraisers that furnishes the ground for setting aside the appraisement; but, * * * it is their mistake of fact as to that which they were to determine and what they were to take into consideration, their misconception of the duties of their position whereby they (unintentionally and without improper motives

> we have no doubt) acted with partiality, so that the appraisement made did not in any proper sense reflect their real judgment and opinions touching the value of the property in question. * * *"

The rule expressed and followed in the *Missouri* case is universally followed by other courts. See *6 C. J. Secundum*, Sec. 90, page 236.

For the application of these principles generally in contract cases, conveyances and transactions of many other types, see *Pomeroy's Equity Jurisprudence* (5th Edition, 1941, Symons), Vol. 3, pages 634, 636, 640 to 643.

8. The Award Is Tainted With Conspiracy and Fraud

Fraud vitiates everything. This is a familiar principle and needs no citation of authority.

We submit that this case fairly reeks with fraud. This is evident, we think, from what has already been said, particularly under the heading "Statement of Case."

As to the character of the written statement submitted by Mr. Reuben to Mr. Price, we wish to add the following observations: It was deliberately planned, without regard to truth or common honesty, to sell Mr. Price on the proposition that respondent could not pay as ground rent as much as $39,000.00 per year, the fixed amount it paid in 1938 and in a number of prior years under the terms of the lease, in addition to large sums for bond retirement, interest, taxes, *et cetera*. (Pl's Ex. 11.) If the value fixed by Mr. Price is to stand, the ground rent under the lease at 4% will amount to $38,000.00 per year. That will be the only rent, except taxes, **the bonds having been fully retired in 1939.** Obviously Mr. Price, who says he did not make an independent check of the matters set forth in the Reuben statement and who accepted the whole of it at face value (R. pp. 719-721), arrived at his decision on the basis of respondent's false representations of its ability to pay

rentals and its false representations of business and trade conditions, and not on the basis of the value of the property.

It appears also from his own testimony that he regarded the 99-year lease in question as an encumbrance on the real estate. (R. pp. 723, 724.)

The evidence shows from the lips of Mr. Sigmond Sanger, the secretary and chief counsel, and Mr. Richard Lennihan, president (then vice-president), of respondent, how the written statement presented by Mr. Reuben to Mr. Price was prepared. If the testimony of Mr. Sanger (R. pp. 160-212) is read by the Court, we are satisfied that the Court will at once get the complete background which resulted in the so-called award, and of his complete willingness to shape his testimony so as to conceal his active connection with the scheme to mislead and impose upon Mr. Price as the third arbitrator.

The arbitrators agreed among themselves that Mr. Crosby and Mr. Reuben should each present to Mr. Price written statements setting forth their opinions of value of the property and their reasons in support thereof. This understanding contemplated only their individual presentation. That this was recognized by Mr. Reuben and respondent is demonstrated by the extreme care taken by Mr. Sanger to hide his authorship of the Reuben statement. (R. pp. 160-212.) It was palmed off on Mr. Price as the individual work of Mr. Reuben. Neither Mr. Price nor Mr. Crosby ever knew what actually happened until after this case was filed and the true facts were then exposed.

9. The Award Was the Result of Fundamental Mistakes on the Part of Mr. Price

(a) It Was Based upon the Tax Valuation

The authors of the Reuben statement made a supreme effort to convince Mr. Price that the land value was no greater than the tax value. This is obvious from Pl's Ex.

11. The tax value was emphasized from beginning to end. We contend that it was not even competent evidence and should not have been considered.

The rule is stated in *20 American Jurisprudence,* page 348, as follows:

> "The general rule is that the valuation placed upon property by a public official for the purposes of taxation only, without participation on the part of the owner or assent by him thereto except by paying the taxes assessed, is not competent evidence on a litigated question of its value for purposes other than taxation. Assessment rolls are no evidence of the market value of the property assessed. * * *"

See, also: *2 Jones Commentaries on Evidence,* 2nd Edition, page 1313; *22 Corpus Juris* 178, Section 172; *17 Ohio Jurisprudence* 221-222, Section 172.

There is an Annotation on this subject in *17 A. L. R.*, page 170, and a supplemental Annotation in *84 A. L. R.* 1485.

It may be said that the overwhelming weight of authority supports the rule as stated. The Supreme Court of Ohio has not spoken on the subject.

Apart from the law as to the admissibility of tax valuations in cases of this kind, it is well known that, as a practical matter, tax valuations frequently bear little relationship to real values or fair market values. In the courts below, opposing counsel made reference to a well known writer concerning real estate appraisals, namely, *Philip W. Kniskern.* He discusses this subject in his work entitled *"Real Estate Appraisal and Valuation,"* and concludes his discussion with the following paragraph:

> "By reason of the methods which are of necessity followed, the results obtained are of very little value as evidence of a justified market value, as a guide to investment, or of the amount that may safely be loaned against a property on mortgage. **The results sought are so different from the objects of an ordi-**

nary appraisal that many of the methods followed in assessing are not suited and are positively dangerous if applied to the type of work discussed in this volume." (P. 103.)

(b) THE AWARD WAS BASED ON THE THEORY THAT THE VALUE TO BE DETERMINED WAS THE VALUE TO RESPONDENT, AND NOT THE VALUE GENERALLY, AND ALSO ON THE THEORY THAT THE LEASE WAS AN ENCUMBRANCE

The syllabus, so far as is pertinent, in *Lowe vs. Brown*, 22 Ohio St. 463 (1872), is as follows:

> "Where it was stipulated in an indenture by which a building lot was leased for ninety-nine years, renewable forever, that, at the expiration of each successive period of twenty years, the 'ground' should be revalued by 'three disinterested men'—one to be selected by the lessor, one by the lessee, and the third by the two thus chosen—who should appraise the same at its 'true value,' * * * HELD:
>
> * * * * *
>
> "4. The value contemplated by the lease is not the rental value of the ground, but its real worth at the time it is required to be appraised, excluding all improvements on the premises."

In the opinion, it is said:

> "3. * * *
>
> "* * * To arrive at this basis, appraisers were to 'view the **ground**' and 'appraise the **same** at its **true** value.' It is clear from this language that the true value contemplated by the covenants of the lease as the basis of the amount of rent, was the fee-simple value of the ground alone, without reference to the purpose for which it was leased, or the character of the improvement thereon. * * *" (P. 468.)

In *Springer vs. Borden*, 112 Ill. App. 168 (1904), there was involved a lease of a certain lot in the City of Chicago. The rent up to a certain date was fixed by the lease, and the lease provided that "during the residue of the term

the lessee should pay a sum equal to five per cent of the cash value of the demised premises, exclusive of the building and improvement." The cash value of the premises was to be fixed by three appraisers. In the opinion, the court says:

> "It was the LOT which was leased and it was the LOT which was to be appraised. **The existence of the lease or its terms and conditions may affect favorably or unfavorably the value of the rights and interest of the lessor in the lot, but they can not affect the value of the lot itself.**
>
> "**In determining the value of the lot for the purposes stated in the lease, it is clear that the cash value of the lot contemplated by the covenants of the lease was the cash value of a fee simple estate in said lot; the cash value of every interest in and right to said lot, considered for the purpose of such valuation as vacant property.** * * *"

The court in *Springer vs. Borden* states that only three cases involving directly the same question were brought to its attention, and that the decision in each of those cases supports the conclusions reached. The cases referred to are: *Philadelphia Library Co. vs. Beaumont,* 39 Penn. S. 43; *Lowe vs. Brown,* 22 Ohio St. 463; *Goddard vs. King,* 40 Minn. 164.

In *Goddard vs. King,* the Supreme Court of Minnesota said:

> "The fact that under the lease the defendant might use the land for a particular purpose, or that he was restricted by it to a particular use, and the fact that plaintiffs had given the defendant a long lease of the land, had nothing whatever to do with its value as between them under the lease, for the valuation was not to be made for the purpose of a sale of the land, thus encumbered, by one to the other. The referees ought to have estimated the market **value of the land as it would have been with the lease** and **improvements** made by the lessee **off.**" (Pp. 166, 167.)

CONCLUSION

We feel that this is a most unusual case and one of exceptional merit. We believe that there has been a grave miscarriage of justice, which this Court alone can correct. We submit that this is not a case where mere prejudicial errors have been committed by the courts, but one in which petitioner's fundamental rights under Section 1 of the Fourteenth Amendment have been violated, in that the judgment of the Court of Appeals upholds an award made without a hearing and in that the errors of the court are so gross and obvious as to amount to arbitrary and capricious exercise of power.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS, LUCAS COUNTY, OHIO

C. A. No. 3865
C. P. No. 155490
April 27, 1942

The Scott Realty Co.,

Appellee,

vs.

The Lasalle & Koch Co.,

Appellant.

APPEAL ON QUESTIONS OF LAW AND FACT

Messrs. Effler & Eastman and Messrs. Fraser, Effler, Shumaker & Winn for appellee.

Messrs, Brown & Sanger; Messrs. Marshall, Melhorn, Davies, Wall & Bloch; Mr. W. A. Belt; Mr. J. I. O'Connor and Mr. Sholto M. Douglas for appellant.

Carpenter. J. This is an appeal on questions of law and fact. By its second amended petition the Scott Realty Company (hereinafter referred to as the Scott Co.) asks the court to set aside as fraudulent and irregular the appraisal made in 1939 of the land owned by it at the corner of Adams and Huron Streets in Toledo on which is located the department store building of defendant, The Lasalle & Koch Company (hereinafter referred to as the Lasalle Co.) which holds a ninety-nine year lease upon that land, made in 1916. The lease provides that the rental, beginning August 1, 1939, shall be "four per cent of the fair market value of said real estate exclusive of buildings and improvements," such value to be fixed every ten years thereafter. If the parties cannot agree upon such value within six

months to ninety days before the beginning of any such ten-year period, it shall be fixed as follows:

> "Not less than sixty (60) days or more than ninety (90) days prior to the beginning of each of said periods, each of the parties hereto shall select a disinterested freeholder, resident of said City of Toledo, as an arbitrator, and the two so selected shall choose a third freeholder, resident of said city and the three so selected shall within thirty (30) days prior to the beginning of the period next thereafter succeeding, in joint session, by a majority vote, determine and fix the fair market value of said real estate, exclusive of the buildings and improvements thereon, and return to each of the parties hereto, in writing, signed in duplicate by any two of them, the value so determined and fixed. The value so determined and returned as aforesaid shall be binding and conclusive as to the parties hereto for the period next thereafter succeeding. * * *
>
> In case said two arbitrators chosen as aforesaid be unable, or shall fail to agree upon a third arbitrator within ten (10) days after the selection of the second of them, or shall fail * * *"

the parties may choose one, but if they do not, they

> "or either of them, may apply to the said judge or court as hereinbefore provided, to select said third arbitrator, and the choice of said judge or court of said third arbitrator shall be binding upon said 'Lessor' and said 'Lessee' the same as if he had been chosen by them or by the other two arbitrators."

In 1939, the parties, being unable to agree upon a valuation, each chose an arbitrator. The Scott Co. selected George P. Crosby, a realtor who had handled its real estate matters for some years and with whom it had counselled regarding the fixing of the valuation in question. The Lasalle Co. chose Al E. Reuben, a realtor who had likewise handled its real estate business for some years and with whom it had consulted about the pending problem.

As neither Crosby nor Reuben were freeholders or

residents of the City of Toledo, the parties in writing waived those requirements of the lease, and likewise they waived any objection to them on the ground of interest, impliedly recognizing that each was interested in behalf of his client.

Crosby and Reuben were not able to agree upon a third arbitrator, so the parties joined in a written application to one of the judges of the Court of Common Pleas to make such selection. In that application they said

> "The parties have duly waived any objection to said two arbitrators on the ground of interest, freeholding or place of residence."

Thereupon the judge named as the third arbitrator, John A. Price, a Toledo lawyer who had not had any special experience in real estate matters. No objection was made to that appointment.

While the lease refers to those persons as "arbitrators," they were in fact appraisers and were so regarded in the lower court. Their sole duty was to "determine and fix the fair market value of said real estate" at that time. They were not concerned about what use would be made of the valuation they fixed. So far as they were concerned, the only controversy between the parties was as to that valuation, not unlike the fixing of a valuation of property destroyed by fire when the owner and insurer cannot agree, as in Royal Ins. Co. vs. Ries, 80 Ohio St. 272, 283. The distinction between arbitration and appraisal is also pointed out in Parks vs. Cleveland Ry. Co., 124 Ohio St. 79, 99.

Within a few days after Mr. Price's selection, he called a meeting of the appraisers who met in his office, and in a general way they discussed how they would proceed. It was agreed that Messrs. Crosby and Reuben would each prepare in his own way what they called a brief, setting forth in writing their respective views on the value of the land.

The next day Mr. Crosby delivered to Mr. Price his brief accompanied by a large volume called a "Survey" of Toledo, which contained a great deal of general information compiled by him about Toledo's industries, traffic counts on various corners in the downtown district including the Lasalle corner, the leased land, and other real estate in that vicinity in the retail district and as to each is given the "appraised value" of the land. In his brief he says of this "Survey"

> "Every bit of information contained in this survey is accurate, having been compiled with the greatest of care."

In the brief he fixes the value of this leased land at $1,612,500.00. In the "Survey," the data on that land gives "appraised value," $852,000.00. Nowhere either in brief or survey is it stated how or by whom these appraised values were determined, and the court did not find in the record where Mr. Price was told who fixed these valuations. Mr. Crosby testified at the trial that they were the "assessed" values, but the record shows that the tax valuation of the land in question was at that time $822,640.00. In both the brief and survey, several near-by parcels of land were mentioned for which tenants pay rents somewhat in proportion to that which would result from his appraisal of the Lasalle Co. land as stated in his brief.

Mr. Reuben did not file his brief for about two weeks, and when he did he attached to it a series of statistical tables and charts showing various details of business in Toledo from 1929 to 1938, and, by percentage indexes, the decline in that period. In his brief he referred to the twenties as the "boom" period and "the golden era." He also attached a letter written to him at his request by two Toledo realtors who two years before had made appraisals of downtown properties, including this, for the county auditor and gave the bases of their valuations, this one was

placed at $792,804.00, and they said in their opinion the value was no higher then than in 1937.

Mr. Reuben gave his estimate as $822,140.00.

Mr. Price testified that he studied both of the briefs and information submitted with them, and that he made some investigation on his own account, and discussed the matter with various people including some realtors, and some of his lawyer friends. He then called Crosby and Reuben to meet with him and told them he thought Mr. Crosby too high and Mr. Reuben too low, and that in his judgment $950,000.00 would be about right. After a very brief discussion, Reuben said he would agree to that value, and Crosby emphatically disagreed and left the meeting. A form of return for the appraisers to use had been prepared and approved by counsel for both parties and left with Price. He filled in the value he and Reuben had agreed upon, $950,000.00, and they both signed several copies and one was sent to each party.

The Scott Co., being dissatisfied with this appraisal, filed this action. The second amended petition contains two causes of action:

1. To set aside as fraudulent and irregular the appraisement and return made by Price and Reuben, and

2. That the court fix the "fair market value of the real estate."

On the fraud charge, it is claimed that the Lasalle Co., by its officers and Reuben, conspired to and did defraud and mislead Mr. Price into fixing an inadequate value.

The claimed irregularity is that the appraisers did not hold a formal hearing with the parties and their counsel present and submitting their evidence and arguments, and that the appraisers did not hold a deliberative session and discuss the matter orally; such, it contends is the meaning of the term "joint session," as used in the lease.

The parties in their own approach to the appraisal,

particularly in the selection of appraisers, materially departed from and modified the scheme provided for in the lease. When they agreed to the selection of their own real estate agents as their respective representatives on the board of appraisers, they robbed the appraisal of the deliberate character the lease contemplated. In so doing they, in effect, made the third man an umpire and it seems that the judge who was informed by the application to him of the interested character of the parties, appraisers, so regarded the matter when he selected a lawyer, not another realtor. Mr. Crosby evidently thought it his duty to represent the Scott Co. In the trial he was asked:

> "Mr. Crosby, do you mean to tell us that Mr. Wilcox (the president of Scott Co.) selected you as an appraiser for the Scott Realty Company without knowing what your opinion of the value was for this property? A. Well, I would say that he—I don't know why he selected me—I suppose he wanted me to represent him."

Mr. Crosby testified that when he gave Mr. Price his briefs and survey, he said:

> "I asked him,—in delivering them to him I asked him to treat them confidentially and hoped that he would do so, to which he said he would."

Mr. Price says he did so treat it. If this were to be a deliberative process, the representative appraisers should and would have exchanged copies of their briefs.

Mr. Reuben testified that he consulted with the officers of the Lasalle Co. about the value of the land, and the preparation of his brief.

Obviously, both briefs and their addenda were, and were intended to be, arguments for their respective parties and they both tried to make them as persuasive as they could.

It is urged that because Reuben took 1929, a boom year, as the basis of his percentage indexes as to various phases

of Toledo business, he committed a fraud upon and misled Mr. Price. Mr. Crosby in his brief, played up the high rentals for nearby sites on leases made in the late twenties, the same boom period. These are mentioned merely to illustrate that each representative-appraiser was only "putting his (or his client's) best foot forward." Mr. Price recognized this and was not deceived nor misled by either.

On the question of "joint session," the appraisers met twice, there is no complaint about the first one or the procedure then agreed upon. But it is urged by Scott Co. that a "joint session" meant that the parties were entitled to appear before the appraisers with counsel and present evidence and arguments, and one of its counsel testified that in a telephone conversation with Mr. Price just after his appointment, he requested such hearing. Mr. Price's version was that he merely offered to appear if the appraisers wished it, and they agreed at the first meeting that the lawyers could not help them. There was a hearing. The two interested appraisers representing their clients presented their respective evidence and arguments in their briefs and the three met and two of them fixed and determined the value. This being merely an appraisal of property of a board, not appointed by a court, but with two of the three being representatives of the parties, their proceedings met the requirements of the lease as expressly modified by the parties, and, as said in Royal Ins. Co. vs. Ries, 80 Ohio St., 272, their refusal to hear evidence and arguments tendered by the parties, assuming as true the Scott Co.'s claim it did tender them, "is not ground for setting aside the appraisement."

As is quite usual in such a disputed valuation of property, expert witnesses for Scott Co., nine of them, placed the value much higher than the appraisal returned; those for Lasalle Co., seven of them, were all lower. This court

can not say that the value as fixed was so inadequate as to indicate either fraud or irregularity.

Finding no fraud or irregularity to warrant setting aside the appraisal, it is "binding and conclusive as to the parties." Having arrived at this conclusion, consideration of the second cause of action is unnecessary.

The second amended petition is dismissed at the cost of the plaintiff.

Overmyer and Lloyd, JJ., concur.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

No.....

THE SCOTT REALTY COMPANY,

Petitioner,

vs.

THE LASALLE & KOCH COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No.....

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONCISE STATEMENT OF CASE

This case arose out of an appraisal of the fair value of land made by three appraisers under the terms of a ninety-nine year lease which provided for a decenial appraisal of the value of the land and the payment in each ten-year period of a rental of 4% of the amount so found to be the value.

The lessor appointed its real estate agent as its appraiser, the defendant appointed its agent and the third was appointed by a judge of the Common Pleas Court on the joint petition of the parties.

The appraisers agreed upon the procedure and method of ascertaining value. The agent-appraisers each prepared

and filed with the third appraiser lengthy written statements of facts and conclusions as to value which were considered by the court-appointed appraiser along with facts developed by his own inquiries.

The three appraisers met to consider the matter. The court-appointed appraiser stated his view as to value, the lessee's agent-appraiser agreed, and the lessor's agent-appraiser refused to agree, whereupon the majority delivered to the parties their decision or award as to valuation.

The lessor then brought a suit in equity in the Common Pleas Court to vacate and set aside the award as fraudulent,* and not in conformity with the terms of the lease. In a second cause of action, the lessor asked the Common Pleas Court to determine the fair value of the land for the purposes of the lease in the event it determined to vacate the award.

After a trial which lasted eight weeks the Common Pleas Court without written or oral opinion or findings vacated the award and determined the valuation.

The lessee then took the case to the Court of Appeals on appeal on law and fact, which, under the law of Ohio, entitled the parties to a trial *de novo*. (General Code of Ohio, Sec. 12223-21.) The case was so tried in the Court of Appeals. By stipulation the facts were presented by the complete record or transcript of testimony taken in the lower court and some additional facts established by depositions.

The Court of Appeals dismissed the lessor's petition and upheld the appraisal award. For the findings and conclusions of the Court of Appeals see Vol. I, page 108,

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* The petition and amended petition, Vol. I, page 1 *et seq.*, of the record, so-called, filed herein, will show the range, variety and epithetic character of the charges of fraud.

Note also from the partial record on file here and more particularly from the complete record, that the facts as stated in petitioner's brief are inaccurate, misleading and incomplete.

of partial record. The opinion of the Court of Appeals appears at the end of the petitioner's brief.

Attention is here called to the fact that the complete record of the case in the Court of Appeals is not now before this court, but only that part which petitioner-lessor elected to print. Volumes I and II are entitled "Transcript of Pertinent Parts of the Record." Though the Supreme Court of Ohio had the complete record before it counsel for lessor used Volumes I and II in argument. (R., Vol. III, p. 935.) They were filed with and were in reality a part of lessor's brief in that court. Volume III is entitled "Proceedings in the Supreme Court of the State of Ohio."

At no time has the respondent been given the opportunity to consider or determine the parts of the record that should be printed or filed in this case, as we believe is intended by the rules of practice in this court. This is a case that turned upon all the facts. It is now brought into this court on a partial and deficient record.

When the Court of Appeals decided the case in favor of the lessee on all the issues of law and fact and entered its judgment, the lessor took it to the Supreme Court on (1) a motion to certify, equivalent to *certiorari,* and (2) upon appeal.

In Ohio the Supreme Court may review any judgment of a Court of Appeals on a motion to certify if it finds the case to be one of great or general public interest. As we say, this is substantially the same as a *certiorari* proceeding in this court. The Supreme Court of Ohio if it involves a constitutional question may review a case on appeal.

Article IV, Section 2, of the Ohio Constitution prescribes the jurisdiction of the Supreme Court in these words:

> "It (the Supreme Court of Ohio) shall have * * * appellate jurisdiction in all cases involving questions arising under the constitution of the United States

> or of this state, * * *. In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review, and affirm, modify or reverse the judgment of the Court of Appeals. * * *"

With its motion to certify and its appeal, the lessor filed in the Supreme Court of Ohio the typewritten transcript of all pleadings and orders theretofore entered in the case and all the testimony taken in the Court of Appeals.

It then printed for its own convenience and as a part of its brief in the Supreme Court of Ohio the parts, but only the parts, of the record it wanted to use in argument under the title "Transcript of Pertinent Parts of Record." That, as we have stated, is what is now before this court.

In the Supreme Court of Ohio the lessor raised what it called a constitutional question by asserting it had been denied due process of law in that the appraisers had not granted or allowed to it a "hearing" at which lessor could appear by counsel, offer testimony and present arguments, as would or might be done in a formal trial before a court.

In all the three years the case had been pending in the Common Pleas Court and Court of Appeals, the lessor had not in pleadings or in any other way made complaint of a violation of the so-called constitutional right. That came for the first time in the Supreme Court of Ohio.

The Supreme Court of Ohio denied the motion to certify presumably because it found in the case no question of great or general public interest and it dismissed the appeal on the motion of the lessee on the ground that no debatable constitutional question was presented. (Record, Vol. III, p. 937.)

In its second amended petition in the Common Pleas Court the lessor had complained that it had been denied a "hearing," but it did not in such petition or at any time

before the case got into the Supreme Court of Ohio complain of a violation of constitutional rights.

Manifestly, the constitutional claims of the appellant cannot be heard now. This has long been the rule of this court and the Supreme Court of Ohio. The Court of Appeals cannot be said to have erred as to a matter to which its attention was never directed and which it had no opportunity to consider. It did not consider, and was not asked to consider, any constitutional question.

In any view the Court of Appeals of Ohio found as a fact that the lessor had a hearing. (Special Finding 17, Record, Vol. I, p. 117.)

Attention is called to the following findings of the Court of Appeals. The court found "upon all issues of fact tendered by the first cause of action of the second amended petition of The Scott Realty Company * * * against The Scott Realty Company and in favor of The Lasalle & Koch Company." (Special Findings Nos. 15 and 16, R., Vol. I, p. 117.)

The court further found that "the appraisal was made fairly and was free from fraud, conspiracy, misrepresentations or irregularities." (Special Finding No. 15, R., Vol. I, p. 116.)

The court further found "that the parties did have a hearing"; that the appraisers did meet "in joint session" and that "the amount of the appraisal ($950,000 land alone) does not indicate either fraud or irregularity." (Special Finding No. 12, R., Vol. I, p. 116.)

Having found that the appraisal was "binding, final and conclusive as to and upon the parties, the Court of Appeals found it unnecessary to consider the second cause of action contained in the second amended petition of The Scott Realty Company." (Special Finding No. 17, R., Vol. I, p. 117.)

Though what we have said should suffice to dispose of

this petition for *certiorari,* we call attention to the following:

1. This was an appraisal proceeding and not an arbitration.

While the lease refers to the valuation proceeding as an arbitration, it was in fact an appraisal. It was so regarded by the three courts that have heard the matter thus far. It has always been so regarded by lessor until the proceedings in this court.

The fact is that counsel for The Scott Realty Company so stipulated in a brief filed with the Court of Common Pleas of Lucas County, Ohio, on September 2, 1939, wherein it was stated on page 7:

> "We readily agree * * * that the so-called arbitration is in reality a mere appraisal of value. * * * Let it be understood therefore for all purposes in this case that where the lease and the petition used the words 'arbitration,' 'arbitrator' or 'arbitrators,' that these words are used in the sense of 'appraisal,' 'appraiser' or 'appraisers'."

2. In an appraisal proceeding the parties are not entitled to a hearing or trial as in a court or as in an arbitration proceeding.

That is the law of Ohio as decided by the Supreme Court of Ohio in *Royal Insurance Co. vs. Ries,* 80 O. S. 272 (1909), 88 N. E. 638, and by the Supreme Court of Ohio and the Court of Appeals of Lucas County, Ohio, in this case.*

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* It is universally held throughout the decisions that appraisers unlike arbitrators need give no notice of their meetings, need not conduct hearings or give the parties an opportunity to present evidence. *Monidah Trust Co. vs. Arctic Construction Co.,* 264 Fed. 303, 9 C. C. A. (1920); *Royal Ins. Co. vs. Ries,* 80 O. S. 272, 88 N. E. 638 (1909); 36 C. Jur. 191, 851; *Fleming vs. Phoenix Assurance Co. of London,* 75 Hun. 530; *Pearson vs. Sanderson,* 128 Ill. 88, 21 N. E. 200 (1889); *Norton vs. Gale,* 95 Ill. 533, 35 Am. (1903); *Wurster vs. Armfield,* 175 N. Y. 256, 67 N. E. 584 (1903); *Zallee vs. Laclede Mutual Fire & Marine Ins.,* 44 Mo. 530 (1869); *Sebree vs. Board of Education,* 254 Ill. 438, 98 N. E. 931 (1912).

In that petitioner has cited *Brown vs. Lyddy,* 11 Hon. 451, we call particular attention to the case of *Wurster vs. Armfield, supra,* which states the present New York rule.

3. The lessor, pivoting its claim on the case of *Worthington vs. Hewes & McCann,* 19 O. S. 66 (1869), asserts that under the law of Ohio, notwithstanding the later case of *Royal Insurance Co. vs. Ries, supra,* and the decisions in the case at bar, parties to an appraisal proceeding are entitled as a matter of constitutional right to a hearing or trial before the appraisers.

4. So it is, that this petition for *certiorari* asks this court to decide

a. That the Court of Appeals erred in its findings of fact and law that the lessor had had a "hearing"; that the appraisers met in "joint session" as required by the lease; and that "the appraisal was made fairly and was free from fraud, conspiracy, misrepresentations and other irregularities."

b. That the law of Ohio as to the procedure of appraisers is not as declared (a) by the Supreme Court of Ohio in *Royal Insurance Co. vs. Ries, supra,* (b) by Court of Appeals, and (c) by the Supreme Court in this case, but on the contrary is as stated in the opinion of the case of *Worthington vs. Hewes & McCann, supra.*

c. That, if the *Worthington* case and not *Royal Insurance Co. vs. Ries, supra,* is held by this court to state the law of Ohio so as to require appraisers to give the parties a hearing, such right of hearing is a constitutional right which continues to be enforceable notwithstanding a judicial finding that in fact a hearing was had.

d. That the lessor may in this court by petition for *certiorari* assert a constitutional right, which it did not assert at any stage of the litigation until it got into the Supreme Court of Ohio.

e. That the facts as to the observance or non-observance of an asserted constitutional right, the violation or non-violation of such asserted right and a variety of Ohio procedural questions may be determined on this petition for *certiorari* on a partial record or transcript.

It is respectfully submitted that unless all such questions are answered in favor of petitioner, and none in

favor of the respondent, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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FILED
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CHARLES ELMORE CROPLEY

IN THE

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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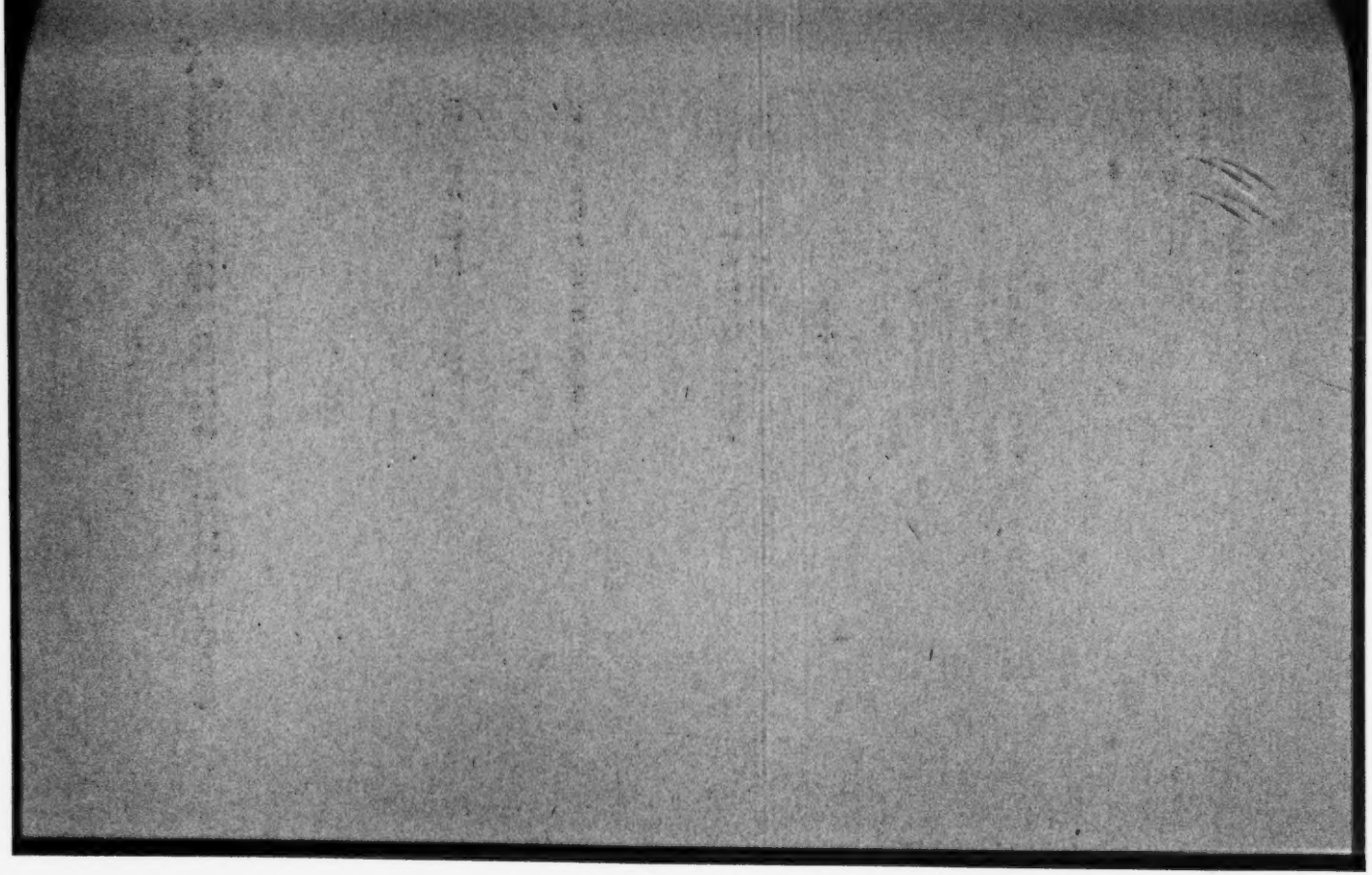

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opposing counsel have filed an extremely short brief, which, we think, calls for a reply. This brief is accordingly filed pursuant to Rule 38, Paragraph 4(a).

THE CLAIM THAT THE PRINTED RECORD IS NOT COMPLETE

At pages 2, 3 and 4 of the opposing brief, it is said that the printed record on file in this Court is not the "complete record"; (p. 3) that it is only a "partial and deficient record"; (p. 3) that it was printed only for the "convenience" of petitioner's counsel and "as a part of

its brief in the Supreme Court of Ohio"; (p. 4) and that reference "particularly" to the "complete record" would show "that the facts as stated in petitioner's brief are inaccurate, misleading and incomplete." (p. 2) Counsel also say: "At no time has the respondent been given the opportunity to consider or determine the parts of the record that should be printed or filed in this case, as we believe is intended by the rules of practice in this court." (p. 3.)

These are grave charges, and they are false.

The printed record before this Court (Volumes I and II) is the record which was printed "for the use of the court below," namely, the Supreme Court of Ohio. This is shown by the certificate of the clerk of that court on file here. This printed record, including Volume III (Proceedings in the Supreme Court of the State of Ohio), has been filed in this Court in accordance with Rule 38, Paragraph 7. Volumes I and II were prepared in strict accordance with Rule IV of the Supreme Court of Ohio, which calls for the printing of "so much of the record, testimony and documents therein, as may be necessary to be considered by the Court."

In accordance with that Rule, a copy of the record so printed was furnished to opposing counsel forthwith, and proof of service was duly filed with the clerk of the Supreme Court of Ohio. Opposing counsel thus had full opportunity to object to the printed record as not being accurate or sufficient for the court below, but no objection of any kind was made. (R. p. 935.) As a matter of fact, Volumes I and II of the printed record on file here contain all of the proceedings in the Common Pleas Court and in the Court of Appeals, and all of the evidence which was before the Court of Appeals except that relating to the second cause of action (the issue of value), which the Court of Appeals found it unnecessary to consider.

THE CLAIM THAT THE CONSTITUTIONAL QUESTIONS CAN NOT BE CONSIDERED BY THIS COURT

On pages 4 and 5 of the opposing brief, it is stated that the constitutional claims "cannot be heard now" (p. 5), because petitioner did not claim a violation of its constitutional rights until the case got into the Supreme Court of Ohio, and that in that court petitioner "raised what it called a constitutional question by asserting it had been denied due process of law in that the appraisers had not granted or allowed to it a 'hearing'." (P. 4.)

In the first place, we wish to say that opposing counsel misconceive our position.

The denial of petitioner's right to due process of law does not rest upon the action or award of the *arbitrators*, or *appraisers*, because that did not involve the exercise of state power. It does rest upon the action of the Court of Appeals in upholding, sanctioning and enforcing the award, where no hearing had been granted, and upon its gross and obvious errors pointed out in our original brief, "coming close to the boundary of arbitrary action" (*Roberts, Receiver, vs. New York*, 295 U. S. 264).

The violation of petitioner's constitutional rights first appeared in the Court of Appeals, namely, in the arbitrary findings and judgment of that court.

The wholly unexpected and capricious action and decision of the Court of Appeals constituted the denial of due process to petitioner. The Common Pleas Court properly followed the decision of the Supreme Court of Ohio in the *Worthington* case and set aside the award because no hearing was accorded the parties, and for the other reasons set out in the second amended petition, but the Court of Appeals ignored the *Worthington* case, ignored the evidence, adopted findings without evidence, refused our request for special findings, refused to find the material pro-

bative facts, refused to answer interrogatories directed to the undisputed facts and matters of record, condoned the false statements and misrepresentations of respondent and its officers, and by its decree gave its judicial sanction to this outrageous award, taking away from petitioner the rents on $550,000.00 of value, the difference between the award and the fair value determined by the Court of Common Pleas.

We are, of course, familiar with the rule urged by opposing counsel, namely, that constitutional questions must ordinarily be asserted at the threshold. As with most general rules, there are exceptions to this one.

As stated by Mr. Justice Cardozo in *Great Northern Railway Co. vs. Sunburst Oil & Refining Co.*, 287 U. S. 358, at page 367 of the opinion:

> "* * * The rule, general as it is, does not extend to cases where the constitutional question, *however tardily raised, is considered and decided* (*Consolidated Turnpike Co. vs. Norfolk & O. V. Ry. Co.*, 228 U. S. 326, 334; *Cumberland Coal Co. vs. Board*, 284 U. S. 23), *nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. Brinkerhoff-Faris Trust & Savings Co. vs. Hill*, 281 U. S. 673, 678; *Missouri ex rel. Missouri Insurance Co. vs. Gehner*, 281 U. S. 313, 320; *American Surety Co. vs. Baldwin, supra.* * * *"

The fifth syllabus of that case is as follows:

> "5. A federal claim first raised by petition for rehearing in a state court is in time for purposes of review if the occasion for it arose unexpectedly from the grounds of the state court's decision."

The general rule contended for by counsel is subject to other exceptions. For instance, in the case of *Arrowsmith vs. Harmoning, Admx., et al.*, 118 U. S. 194, which was an appeal from the Supreme Court of Ohio, the question was raised for the first time in that court and was

not noticed in the opinion of that court. This Court held that it was timely under the circumstances of the case.

It is well settled that constitutional questions raised for the first time in the Supreme Court of the state are timely, and that the fact that such questions are not raised in the trial court is immaterial, *where the state court decided them. Sully vs. American National Bank,* 178 U. S. 289, 298; *Home Insurance Co. vs. Dick,* 281 U. S. 397, 407; *Schuylkill Trust Company vs. Pennsylvania,* 296 U. S. 113.

In the case of *Whitfield vs. Ohio,* 297 U. S. 431, 436, the constitutional questions were not raised in the trial court, but were raised in the Court of Appeals and decided. The Supreme Court of Ohio dismissed the petition in error, but this Court held that the assertion of the constitutional claims was timely and took jurisdiction.

In a number of cases the constitutional claims were first asserted on writs of error in the Supreme Court of the state, which was held to be timely and sufficient. *Rothschild vs. Knight,* 184 U. S. 334; *Meyer vs. Richmond.* 172 U. S. 82; *Farmers' & Merchants' Insurance Company vs. Dobney,* 189 U. S. 301; see also *International Harvester Company vs. Missouri,* 234 U. S. 199, 206.

In *Brinkerhoff-Faris Trust & Savings Company vs. Hill,* 281 U. S. 673, the constitutional claims were first asserted on a petition for rehearing in the Supreme Court of the state. The first syllabus of the case is as follows:

> "1. A federal claim first raised by petition for rehearing in a state court is in time for purposes of review here if it was raised at the first opportunity, even though the petition was denied without opinion."

In *Saunders vs. Shaw et al.,* 244 U. S. 317, it was held that:

> "A claim that a judgment of a state supreme court violates rights under the Fourteenth Amendment is not too late, though first made by the assign-

> ment of errors presented to its Chief Justice when the writ of error from this court was granted, if the aggrieved party was under no duty to anticipate the state court's action before the judgment was rendered and was afforded no opportunity afterwards to present the claim for its consideration."

It should be noted that the Supreme Court of Ohio *considered and decided the constitutional questions* in the instant case (R. p. 937). This Court has held that such a decision is "a decision of the case on the merits." *Van Huffel vs. Harkelrode, Treasurer,* 284 U. S. 225, 230.

Obviously the constitutional claims in the case at bar could not have been asserted, and there was no occasion to assert them, until the Court of Appeals had acted. Petitioner could not anticipate that the Court of Appeals would ignore the decision of the Supreme Court of Ohio in the *Worthington* case. Its action was wholly unexpected, and its decree constituted the exercise of state power which operated as a denial of petitioner's right to due process. The very earliest time at which the constitutional claims could have been asserted was in the notice of appeal and the assignment of errors, unless it be argued that they should have been included in the motion for a new trial. This would have been a vain thing because the Rules of Practice of the Court of Appeals make no reference to motions for new trial, and it is the settled practice of the Court of Appeals not to grant hearings.

It is clear that the constitutional claims were asserted at the first and only effective time possible.

THE CLAIM THAT THE FINDINGS OF THE COURT OF APPEALS ARE CONCLUSIVE

At page 5 of the opposing brief there is a recital of certain findings of the Court of Appeals, premised by the statement that in "any view the Court of Appeals of Ohio found as a fact that the lessor had a hearing." It seems a mockery to have opposing counsel ask this Court to treat those so-called findings as sacrosanct when they are, as shown in our original brief (pp. 29 to 33), not really special findings, but general findings mixed with conclusions of law, made without any evidence or directly contrary to the admitted or undisputed evidence.

THE CLAIM THAT THE WORTHINGTON CASE, 19 OHIO ST. 66, HAS BEEN OVERRULED

Opposing counsel at page 6 say that this was an appraisal proceeding and not an arbitration, and that the parties were, therefore, not entitled to a hearing before the appraisers. They also say:

> "That is the law of Ohio as decided by the Supreme Court of Ohio in *Royal Insurance Co. vs. Ries*, 80 O. S. 272 (1909), 88 N. E. 638, and by the Supreme Court of Ohio and the Court of Appeals of Lucas County, Ohio, in this case."

Reference to Shepard's Citator will show that the Supreme Court of Ohio has not overruled, or in any way qualified, its holding in the *Worthington* case, and that the arbitrators, or appraisers, in a case of this kind must afford the parties a hearing. In so holding the court says:

> "* * * *In so holding it is unnecessary to say whether the proceeding is to be regarded as an arbitration or not.* * * * *But we think it is a proceeding of that importance, and so liable to possible abuse, fraud, or mistake, that the parties to be affected thereby should have an opportunity to be heard.* * * *" (Opinion, p. 78.)

Royal Insurance Co. vs. Ries, 80 Ohio St. 272, relates to an entirely different situation. That case is discussed in our original brief at page 45. The *Ries* case does not purport to discuss or affect the doctrine of the *Worthington* case; indeed, that case is not even mentioned.

The Court of Appeals in the instant case did not purport to overrule or in any way affect the *Worthington* case. It did not even mention it. It simply circumvented that case by arbitrarily holding that the parties had materially modified and departed from the lease contract; that the two appraisers appointed by the parties became their respective agents and representatives; that the third appraiser became the umpire; and that the appraisal proceedings met the requirements of the lease "as expressly modified by the parties."

(Court of Appeals Opinion, original brief, p. 65.)

The Supreme Court of Ohio in the instant case did not purport to overrule or in any way affect the *Worthington* case. It simply dismissed the appeal as of right on the constitutional questions and overruled the motion to certify. The effect of overruling the motion to certify is stated by the Supreme Court of Ohio as follows:

> "When this court overrules a motion to certify a record, no precedent for the decision of later cases by this court is thereby established."
>
> (*Swetland Co. vs. Evatt,* 139 Ohio St. 6, 7, 2nd syllabus.)

> "As was said by Judge Jones in the case of *Village of Brewster vs. Hill,* 128 Ohio St. 343, 352, 190 N. E. 766:
>
> 'We have heretofore announced that, in cases knocking at our door for certification, the refusal of a motion to certify, even if the same legal question is decisively involved, does not furnish an

adjudication of the question by this court as an established precedent for future cases.' "

(*Swetland Co. vs. Evatt,* 139 Ohio St. 6, 18.)

CONCLUSION

In view of the foregoing, we respectfully submit that obviously the questions as stated on page 7 of the opposing brief (paragraph 4) are not the questions before this Court. The questions before this Court are simply these:

> Did not the Court of Appeals by its arbitrary findings and judgment and its other gross and obvious errors violate petitioner's right to due process under Section 1 of the Fourteenth Amendment, and was not the Supreme Court of Ohio gravely wrong in declining a review and in adjudicating the constitutional questions adversely to petitioner?

Respectfully submitted,

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